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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1972

MARCH 21 (CONCLUDED) THROUGH MAY 14, 1973

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

TRIBUTE TO MR. JUSTICE DOUGLAS

SUPREME COURT OF THE UNITED STATES

TUESDAY, APRIL 17, 1973

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

Before proceeding with our regular matters this morning, we will pause for a moment to take note of an important anniversary of our Brother, MR. JUSTICE WILLIAM O. DOUGLAS. Thirty-four years ago today he took the oath of office as an Associate Justice of this Court and in the history of this Court only Chief Justice Marshall, our late Brother Justice Black, and Justice Field served longer. Very soon JUSTICE DOUGLAS will surpass the record of even those three Justices. In his long career on this Court he has been a strong, articulate individualist willing to blaze new trails whether in the majority or in dissent but also willing to tread ancient paths of the law.

Several qualities distinguish JUSTICE DOUGLAS from many other illustrious predecessors on the Court but I will mention only one. He is possessed of a restless, questing mind and spirit not only in the law but in relation to the world around him and in the events of his time. On his vacations he has climbed mountains, visited strange parts of strange lands and he has written and lectured about them. He has also written of current developments on the social, economic, and political scene, and for all of his life he has been devoted to nature and the outdoor life. He was a student of ecology before the word had currency and in his concern for man's environment he was far ahead of his time. His service on the Court spans the tenure of five Chief Justices and by the end of this Term of Court his opinions will have appeared in 103 volumes of the United States Reports, or more than one-fourth of all volumes of reported cases of the Court.

I know I speak for all Justices and retired Justices on this anniversary in extending to you, Bill, our best wishes for continued good health, long life and much happiness, and many more mountains to climb.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1972

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT ET AL. *v.* RODRIGUEZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 71-1332. Argued October 12, 1972—Decided March 21, 1973

The financing of public elementary and secondary schools in Texas is a product of state and local participation. Almost half of the revenues are derived from a largely state-funded program designed to provide a basic minimum educational offering in every school. Each district supplements state aid through an ad valorem tax on property within its jurisdiction. Appellees brought this class action on behalf of schoolchildren said to be members of poor families who reside in school districts having a low property tax base, making the claim that the Texas system's reliance on local property taxation favors the more affluent and violates equal protection requirements because of substantial interdistrict disparities in per-pupil expenditures resulting primarily from differences in the value of assessable property among the districts. The District Court, finding that wealth is a "suspect" classification and that education is a "fundamental" right, concluded that the system could be upheld only upon a showing, which appellants failed to make, that there was a compelling state interest for the system. The court also concluded that appellants failed even to demonstrate a reasonable or rational basis for the State's system. *Held:*

1. This is not a proper case in which to examine a State's laws under standards of strict judicial scrutiny, since that test is reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. Pp. 18–44.

(a) The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of "poor" people or to occasion discriminations depending on the relative wealth of the families in any district. And, insofar as the financing system disadvantages those who, disregarding their individual income characteristics, reside in comparatively poor school districts, the resulting class cannot be said to be suspect. Pp. 18–28.

(b) Nor does the Texas school-financing system impermissibly interfere with the exercise of a "fundamental" right or liberty. Though education is one of the most important services performed by the State, it is not within the limited category of rights recognized by this Court as guaranteed by the Constitution. Even if some identifiable quantum of education is arguably entitled to constitutional protection to make meaningful the exercise of other constitutional rights, here there is no showing that the Texas system fails to provide the basic minimal skills necessary for that purpose. Pp. 29–39.

(c) Moreover, this is an inappropriate case in which to invoke strict scrutiny since it involves the most delicate and difficult questions of local taxation, fiscal planning, educational policy, and federalism, considerations counseling a more restrained form of review. Pp. 40–44.

2. The Texas system does not violate the Equal Protection Clause of the Fourteenth Amendment. Though concededly imperfect, the system bears a rational relationship to a legitimate state purpose. While assuring a basic education for every child in the State, it permits and encourages participation in and significant control of each district's schools at the local level. Pp. 44–53.

337 F. Supp. 280, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined.

STEWART, J., filed a concurring opinion, *post,* p. 59. BRENNAN, J., filed a dissenting opinion, *post,* p. 62. WHITE, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 63. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 70.

Charles Alan Wright argued the cause for appellants. With him on the briefs were *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, *J. C. Davis* and *Pat Bailey,* Assistant Attorneys General, and *Samuel D. McDaniel.*

Arthur Gochman argued the cause for appellees. With him on the brief was *Mario Obledo.**

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*Briefs of *amici curiae* urging reversal were filed by *George F. Kugler, Jr.,* Attorney General, *pro se,* and *Stephen Skillman,* Assistant Attorney General, for the Attorney General of New Jersey; by *George W. Liebmann* and *Shale D. Stiller* for Montgomery County, Maryland, joined by *Francis B. Burch,* Attorney General of Maryland, *Henry R. Lord,* Deputy Attorney General, *E. Stephen Derby,* Assistant Attorney General; *William J. Baxley,* Attorney General of Alabama; *Gary K. Nelson,* Attorney General of Arizona, *James G. Bond,* Assistant Attorney General; *Evelle J. Younger,* Attorney General of California, *Elizabeth Palmer,* Assistant Attorney General, *Edward M. Belasco,* Deputy Attorney General; *Duke W. Dunbar,* Attorney General of Colorado; *Robert K. Killian,* Attorney General of Connecticut, *F. Michael Ahern,* Assistant Attorney General; *W. Anthony Park,* Attorney General of Idaho, *James R. Hargis,* Deputy Attorney General; *Theodore L. Sendak,* Attorney General of Indiana; *Charles M. Wells, Harry T. Ice, Richard C. Turner,* Attorney General of Iowa, *George W. Murray,* Assistant Attorney General; *Vern Miller,* Attorney General of Kansas, *Matthew J. Dowd* and *John C. Johnson,* Assistant Attorneys General; *Ed W. Hancock,* Attorney General of Kentucky, *Carl T. Miller,* Assistant Attorney General; *William J. Guste, Jr.,* Attorney General of Louisiana; *James S. Erwin,* Attorney General of Maine, *George West,* Assistant Attorney General; *Robert H. Quinn,* Attorney General of Massachusetts, *Lawrence T. Bench,* Assistant Attorney General, *Charles F. Clippert,* MR. JUSTICE POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and sec-

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William M. Saxton, Robert B. Webster; A. F. Summer, Attorney General of Mississippi, *Martin R. McLendon,* Assistant Attorney General; *John Danforth,* Attorney General of Missouri, *D. Brook Bartlett,* Assistant Attorney General; *Clarence A. H. Meyer,* Attorney General of Nebraska, *Harold Mosher,* Assistant Attorney General; *Warren B. Rudman,* Attorney General of New Hampshire; *Louis J. Lefkowitz,* Attorney General of New York; *Robert B. Morgan,* Attorney General of North Carolina, *Burley B. Mitchell, Jr.,* Assistant Attorney General; *Helgi Johanneson,* Attorney General of North Dakota, *Gerald Vandewalle,* Assistant Attorney General; *Lee Johnson,* Attorney General of Oregon; *Daniel R. McLeod,* Attorney General of South Carolina, *G. Lewis Argoe, Jr.,* Assistant Attorney General; *Gordon Mydland,* Attorney General of South Dakota, *C. J. Kelly,* Assistant Attorney General; *David M. Pack,* Attorney General of Tennessee, *Milton P. Rice,* Deputy Attorney General; *Vernon B. Romney,* Attorney General of Utah, *Robert B. Hansen,* Deputy Attorney General; *James M. Jeffords,* Attorney General of Vermont; *Chauncey H. Browning, Jr.,* Attorney General of West Virginia, *Victor A. Barone,* Assistant Attorney General; *Robert W. Warren,* Attorney General of Wisconsin, and *Betty R. Brown,* Assistant Attorney General; and by *John D. Maharg* and *James W. Briggs* for Richard M. Clowes, Superintendent of Schools of the County of Los Angeles, et al.

Briefs of *amici curiae* urging affirmance were filed by *David Bonderman* and *Peter Van N. Lockwood* for Wendell Anderson, Governor of Minnesota, et al.; by *Robert R. Coffman* for Wilson Riles, Superintendent of Public Instruction of California, et al.; by *Roderick M. Hills* for Houston I. Flournoy, Controller of California; by *Ramsey Clark, John Silard, David C. Long, George L. Russell, Jr., Harold J. Ruvoldt, Jr., J. Albert Woll, Thomas E. Harris, John Ligtenberg, A. L. Zwerdling,* and *Stephen I. Schlossberg* for the Mayor and City Council of Baltimore et al.; by *George H. Spencer* for San Antonio Independent School District; by *Norman Dorsen, Marvin M. Karpatkin, Melvin L. Wulf, Paul S. Berger, Joseph B.*

ondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.[1] They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants[2] were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The com-

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Robison, Arnold Forster, and *Stanley P. Hebert* for the American Civil Liberties Union et al.; by *Jack Greenberg, James M. Nabrit III, Norman J. Chachkin,* and *Abraham Sofaer* for the NAACP Legal Defense and Educational Fund, Inc.; by *Stephen J. Pollak, Ralph J. Moore, Jr., Richard M. Sharp,* and *David Rubin* for the National Education Assn. et al.; and by *John E. Coons* for John Serrano, Jr., et al.

Briefs of *amici curiae* were filed by *Lawrence E. Walsh, Victor W. Bouldin, Richard B. Smith,* and *Guy M. Struve* for the Republic National Bank of Dallas et al., and by *Joseph R. Cortese, Joseph Guandolo, Bryce Huguenin, Manly W. Mumford, Joseph H. Johnson, Jr., Joseph Rudd, Fred H. Rosenfeld, Herschel H. Friday, George Herrington, Harry T. Ice, Cornelius W. Grafton, Fred G. Benton, Jr., Eugene E. Huppenbauer, Jr., Harold B. Judell, Robert B. Fizzell, John B. Dawson, George J. Fagin, Howard A. Rankin, Huger Sinkler, Robert W. Spence, Hobby H. McCall, James R. Ellis,* and *William J. Kiernan, Jr.,* Bond Counsel.

[1] Not all of the children of these complainants attend public school. One family's children are enrolled in private school "because of the condition of the schools in the Edgewood Independent School District." Third Amended Complaint, App. 14.

[2] The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area that were originally named as defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District joined in the plaintiffs' challenge to the State's school finance system and filed an *amicus curiae* brief in support of that position in this Court.

plaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969.[3] In December 1971[4] the panel rendered its judgment in a *per curiam* opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[5] The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. 406 U. S. 966 (1972). For the reasons stated in this opinion, we reverse the decision of the District Court.

I

The first Texas State Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools.[6] Early in its history, Texas adopted a dual approach to the financing of its schools, relying on mutual participation by the local school districts and the State. As early as 1883, the state constitution was amended to provide for the creation of local school districts empowered to levy ad valorem taxes with the consent of local taxpayers for the "erection . . . of school buildings" and for the "further maintenance of public free schools." [7] Such local funds as were raised were supplemented by funds distributed to each district from the State's Permanent and Available School Funds.[8] The Permanent School Fund, its predecessor established in 1854 with $2,000,000 realized from an annexation settlement,[9] was thereafter endowed with millions of acres of public land set aside to assure a continued source of income for school support.[10] The Available School Fund, which received income from the Permanent School Fund as well as from a state ad valorem property tax and other designated taxes,[11] served as the disbursing arm for most state educational funds throughout the late 1800's and first half of this century. Additionally, in 1918 an increase in state property taxes was used to finance a program providing free textbooks throughout the State.[12]

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[3] A three-judge court was properly convened and there are no questions as to the District Court's jurisdiction or the direct appealability of its judgment. 28 U. S. C. §§ 1253, 2281.

[4] The trial was delayed for two years to permit extensive pretrial discovery and to allow completion of a pending Texas legislative investigation concerning the need for reform of its public school finance system. 337 F. Supp. 280, 285 n. 11 (WD Tex. 1971).

[5] 337 F. Supp. 280. The District Court stayed its mandate for two years to provide Texas an opportunity to remedy the inequities found in its financing program. The court, however, retained jurisdiction to fashion its own remedial order if the State failed to offer an acceptable plan. *Id.*, at 286.

[6] Tex. Const., Art. X, § 1 (1845):

"A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provision for the support and maintenance of public schools."

Id., § 2:

"The Legislature shall as early as practicable establish free schools throughout the State, and shall furnish means for their support, by taxation on property . . . ."

Until recent times, Texas was a predominantly rural State and its population and property wealth were spread relatively evenly across the State.[13] Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced.[14] The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.[15]

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[7] Tex. Const. of 1876, Art. 7, § 3, as amended, Aug. 14, 1883.

[8] *Id.*, Art. 7, §§ 3, 4, 5.

[9] 3 Gammel's Laws of Texas 1847–1854, p. 1461. See Tex. Const., Art. 7, §§ 1, 2, 5 (interpretive commentaries); 1 Report of Governor's Committee on Public School Education, The Challenge and the Chance 27 (1969) (hereinafter Governor's Committee Report).

[10] Tex. Const., Art. 7, § 5 (see also the interpretive commentary); 5 Governor's Committee Report 11–12.

[11] The various sources of revenue for the Available School Fund are cataloged in A Report of the Adequacy of Texas Schools, prepared by Texas State Board of Education, 7–15 (1938) (hereinafter Texas State Bd. of Educ.).

[12] Tex. Const., Art. 7, § 3, as amended, Nov. 5, 1918 (see interpretive commentary).

In due time it became apparent to those concerned with financing public education that contributions from the Available School Fund were not sufficient to ameliorate these disparities.[16] Prior to 1939, the Available School Fund contributed money to every school district at a rate of $17.50 per school-age child.[17] Although the amount was increased several times in the early 1940's,[18] the Fund was providing only $46 per student by 1945.[19]

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[13] 1 Governor's Committee Report 35; Texas State Bd. of Educ., *supra*, n. 11, at 5-7; J. Coons, W. Clune, & S. Sugarman, Private Wealth and Public Education 48-49 (1970); E. Cubberley, School Funds and Their Apportionment 21-27 (1905).

[14] By 1940, one-half of the State's population was clustered in its metropolitan centers. 1 Governor's Committee Report 35.

[15] Gilmer-Aikin Committee, To Have What We Must 13 (1948).

[16] R. Still, The Gilmer-Aikin Bills 11-13 (1950); Texas State Bd. of Educ., *supra*, n. 11.

[17] Still, *supra*, n. 16, at 12. It should be noted that during this period the median per-pupil expenditure for all schools with an enrollment of more than 200 was approximately $50 per year. During this same period, a survey conducted by the State Board of Education concluded that "in Texas the best educational advantages offered by the State at present may be had for the median cost of $52.67 per year per pupil in average daily attendance." Texas State Bd. of Educ., *supra*, n. 11, at 56.

[18] General Laws of Texas, 46th Legis., Reg. Sess. 1939, c. 7, pp. 274-275 ($22.50 per student); General & Spec. Laws of Texas, 48th Legis., Reg. Sess. 1943, c. 161, pp. 262-263 ($25 per student).

Recognizing the need for increased state funding to help offset disparities in local spending and to meet Texas' changing educational requirements, the state legislature in the late 1940's undertook a thorough evaluation of public education with an eye toward major reform. In 1947, an 18-member committee, composed of educators and legislators, was appointed to explore alternative systems in other States and to propose a funding scheme that would guarantee a minimum or basic educational offering to each child and that would help overcome interdistrict disparities in taxable resources. The Committee's efforts led to the passage of the Gilmer-Aikin bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation School Program.[20] Today, this Program accounts for approximately half of the total educational expenditures in Texas.[21]

The Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible—as a unit—for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State.[22] Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county.[23] The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

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[19] General & Spec. Laws of Texas, 49th Legis., Reg. Sess. 1945, c. 52, pp. 74–75; Still, *supra*, n. 16, at 12.

[20] For a complete history of the adoption in Texas of a foundation program, see Still, *supra*, n. 16. See also 5 Governor's Committee Report 14; Texas Research League, Public School Finance Problems in Texas 9 (Interim Report 1972).

[21] For the 1970–1971 school year this state aid program accounted for 48% of all public school funds. Local taxation contributed 41.1% and 10.9% was provided in federal funds. Texas Research League, *supra*, n. 20, at 9.

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children[24] but that would not by itself exhaust any district's resources.[25] Today every school district does impose a property tax from which it derives locally expendable funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

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[22] 5 Governor's Committee Report 44–48.

[23] At present, there are 1,161 school districts in Texas. Texas Research League, *supra*, n. 20, at 12.

[24] In 1948, the Gilmer-Aikin Committee found that some school districts were not levying any local tax to support education. Gilmer-Aikin Committee, *supra*, n. 15, at 16. The Texas State Board of Education Survey found that over 400 common and independent school districts were levying no local property tax in 1935–1936. Texas State Bd. of Educ., *supra* n. 11, at 39–42.

[25] Gilmer-Aikin Committee, *supra*, n. 15, at 15.

In the years since this program went into operation in 1949, expenditures for education—from state as well as local sources—have increased steadily. Between 1949 and 1967, expenditures increased approximately 500%.[26] In the last decade alone the total public school budget rose from $750 million to $2.1 billion[27] and these increases have been reflected in consistently rising per-pupil expenditures throughout the State.[28] Teacher salaries, by far the largest item in any school's budget, have increased dramatically—the state-supported minimum salary for teachers possessing college degrees has risen from $2,400 to $6,000 over the last 20 years.[29]

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is $5,960—the lowest in the metropolitan area—and the median family income ($4,686) is also the lowest.[30] At an equalized tax rate of $1.05 per $100 of assessed property—the highest in the metropolitan area—the district contributed $26 to the education of each child for the 1967–1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed $222 per pupil for a state-local total of $248.[31] Federal funds added another $108 for a total of $356 per pupil.[32]

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[26] 1 Governor's Committee Report 51–53.

[27] Texas Research League, *supra,* n. 20, at 2.

[28] In the years between 1949 and 1967, the average per-pupil expenditure for all current operating expenses increased from $206 to $493. In that same period, capital expenditures increased from $44 to $102 per pupil. 1 Governor's Committee Report 53–54.

[29] Acts 1949, 51st Legis., p. 625, c. 334, Art. 4, Tex. Educ. Code Ann. § 16.302 (1972); see generally 3 Governor's Committee Report 113–146; Berke, Carnevale, Morgan & White, The Texas School Finance Case: A Wrong in Search of a Remedy, 1 J. of L. & Educ. 659, 681–682 (1972).

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly "Anglo," having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds $49,000,[33] and the median family income is $8,001. In 1967–1968 the local tax rate of $.85 per $100 of valuation yielded $333 per pupil over and above its contribution to the Foundation Program. Coupled with the $225 provided from that Program, the district was able to supply $558 per student. Supplemented by a $36 per-pupil grant from federal sources, Alamo Heights spent $594 per pupil.

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[30] The family income figures are based on 1960 census statistics.

[31] The Available School Fund, technically, provides a second source of state money. That Fund has continued as in years past (see text accompanying nn. 16–19, *supra*) to distribute uniform per-pupil grants to every district in the State. In 1968, this Fund allotted $98 per pupil. However, because the Available School Fund contribution is always subtracted from a district's entitlement under the Foundation Program, it plays no significant role in educational finance today.

[32] While federal assistance has an ameliorating effect on the difference in school budgets between wealthy and poor districts, the District Court rejected an argument made by the State in that court that it should consider the effect of the federal grant in assessing the discrimination claim. 337 F. Supp., at 284. The State has not renewed that contention here.

Although the 1967–1968 school year figures provide the only complete statistical breakdown for each category of aid,[34] more recent partial statistics indicate that the previously noted trend of increasing state aid has been significant. For the 1970–1971 school year, the Foundation School Program allotment for Edgewood was $356 per pupil, a 62% increase over the 1967–1968 school year. Indeed, state aid alone in 1970–1971 equaled Edgewood's entire 1967–1968 school budget from local, state, and federal sources. Alamo Heights enjoyed a similar increase under the Foundation Program, netting $491 per pupil in 1970–1971.[35] These recent figures also reveal the extent to which these two districts' allotments were funded from their own required contributions to the Local Fund Assignment. Alamo Heights, because of its relative wealth, was required to contribute out of its local property tax collections approximately $100 per pupil, or about 20% of its Foundation grant. Edgewood, on the other hand, paid only $8.46 per pupil, which is about 2.4% of its grant.[36] It appears then that, at least as to these two districts, the Local Fund Assignment does reflect a rough approximation of the relative taxpaying potential of each.[37]

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[33] A map of Bexar County included in the record shows that Edgewood and Alamo Heights are among the smallest districts in the county and are of approximately equal size. Yet, as the figures above indicate, Edgewood's student population is more than four times that of Alamo Heights. This factor obviously accounts for a significant percentage of the differences between the two districts in per-pupil property values and expenditures. If Alamo Heights had as many students to educate as Edgewood does (22,000) its per pupil assessed property value would be approximately $11,100 rather than $49,000, and its per-pupil expenditures would therefore have been considerably lower.

[34] The figures quoted above vary slightly from those utilized in the District Court opinion. 337 F. Supp., at 282. These trivial differences are apparently a product of that court's reliance on slightly different statistical data than we have relied upon.

[35] Although the Foundation Program has made significantly greater contributions to both school districts over the last several years, it

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is apparent that Alamo Heights has enjoyed a larger gain. The sizable difference between the Alamo Heights and Edgewood grants is due to the emphasis in the State's allocation formula on the guaranteed minimum salaries for teachers. Higher salaries are guaranteed to teachers having more years of experience and possessing more advanced degrees. Therefore, Alamo Heights, which has a greater percentage of experienced personnel with advanced degrees, receives more state support. In this regard, the Texas Program is not unlike that presently in existence in a number of other States. Coons, Clune & Sugarman, *supra*, n. 13, at 63–125. Because more dollars have been given to districts that already spend more per pupil, such Foundation formulas have been described as "anti-equalizing." *Ibid.* The formula, however, is anti-equalizing only if viewed in absolute terms. The percentage disparity between the two Texas districts is diminished substantially by state aid. Alamo Heights derived in 1967–1968 almost 13 times as much money from local taxes as Edgewood did. The state aid grants to each district in 1970–1971 lowered the ratio to approximately two to one, *i. e.*, Alamo Heights had a little more than twice as much money to spend per pupil from its combined state and local resources.

[36] Texas Research League, *supra*, n. 20, at 13.

[37] The Economic Index, which determines each county's share of the total Local Fund Assignment, is based on a complex formula conceived in 1949 when the Foundation Program was instituted. See text, *supra*, at 9–10. It has frequently been suggested by Texas researchers that the formula be altered in several respects

Despite these recent increases, substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State[38] still exist. And it was

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to provide a more accurate reflection of local taxpaying ability, especially of urban school districts. 5 Governor's Committee Report 48; Texas Research League, Texas Public School Finance: A Majority of Exceptions 31–32 (2d Interim Report 1972); Berke, Carnevale, Morgan & White, *supra,* n. 29, at 680–681.

[38] The District Court relied on the findings presented in an affidavit submitted by Professor Berke of Syracuse University. His sampling of 110 Texas school districts demonstrated a direct correlation between the amount of a district's taxable property and its level of per-pupil expenditures. But his study found only a partial correlation between a district's median family income and per-pupil expenditures. The study also shows, in the relatively few districts at the extremes, an inverse correlation between percentage of minorities and expenditures.

Categorized by Equalized Property Values,
Median Family Income, and State-Local Revenue

Market Value of Taxable Property Per Pupil	*Median Family Income From 1960*	*Per Cent Minority Pupils*	*State & Local Revenues Per Pupil*
Above $100,000 (10 districts)	$5,900	8%	$815
$100,000–$50,000 (26 districts)	$4,425	32%	$544
$50,000–$30,000 (30 districts)	$4,900	23%	$483
$30,000–$10,000 (40 districts)	$5,050	31%	$462
Below $10,000 (4 districts)	$3,325	79%	$305

Although the correlations with respect to family income and race appear only to exist at the extremes, and although the affiant's methodology has been questioned (see Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano* v. *Priest* and its Progeny, 120 U. Pa. L. Rev. 504, 523–525, nn. 67, 71 (1972)), insofar as any of these correlations is relevant to the these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause. The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. 337 F. Supp., at 282. Finding that wealth is a "suspect" classification and that education is a "fundamental" interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest. *Id.*, at 282–284. On this issue the court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications." *Id.*, at 284.

Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights[39] or that involve suspect classifications.[40] If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification," that the State must

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constitutional thesis presented in this case we may accept its basic thrust. But see *infra*, at 25–27. For a defense of the reliability of the affidavit, see Berke, Carnevale, Morgan & White, *supra*, n. 29.

[39] *E. g., Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

[40] *E. g., Graham* v. *Richardson*, 403 U. S. 365 (1971); *Loving* v. *Virginia*, 388 U. S. 1 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964).

demonstrate that its educational system has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives,[41] the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that "[n]o one familiar with the Texas system would contend that it has yet achieved perfection."[42] Apart from its concession that educational financing in Texas has "defects"[43] and "imperfections,"[44] the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a "reasonable basis."

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

II

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school financing. In concluding that strict judicial scrutiny was required, that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes,[45] and on cases disapproving wealth restrictions on the right to vote.[46] Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then reasoned, based on decisions of this Court affirming the undeniable importance of education,[47] that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

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[41] See *Dunn* v. *Blumstein, supra,* at 343, and the cases collected therein.

[42] Brief for Appellants 11.

[43] *Ibid.*

[44] Tr. of Oral Arg. 3; Reply Brief for Appellants 2.

We are unable to agree that this case, which in significant aspects is *sui generis*, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect-classification nor the fundamental-interest analysis persuasive.

A

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States,[48] is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "poor" cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

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[45] *E. g., Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Douglas* v. *California,* 372 U. S. 353 (1963).

[46] *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966); *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969); *Bullock* v. *Carter,* 405 U. S. 134 (1972); *Goosby* v. *Osser,* 409 U. S. 512 (1973).

[47] See cases cited in text, *infra,* at 29–30.

[48] *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P. 2d 1241 (1971); *Van Dusartz* v. *Hatfield,* 334 F. Supp. 870 (Minn. 1971); *Robinson* v. *Cahill,* 118 N. J. Super. 223, 287 A. 2d 187 (1972); *Milliken* v. *Green,* 389 Mich. 1, 203 N. W. 2d 457 (1972), rehearing granted, Jan. 1973.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court's opinion and of appellees' complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school financing might be regarded as discriminating (1) against "poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent,"[49] or

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[49] In their complaint, appellees purported to represent a class composed of persons who are "poor" and who reside in school districts having a "low value of . . . property." Third Amended Complaint, App. 15. Yet appellees have not defined the term "poor" with reference to any absolute or functional level of impecunity. See

(2) against those who are relatively poorer than others,[50] or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.[51] Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect.

The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In *Griffin* v. *Illinois,*

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text, *infra,* at 22–23. See also Brief for Appellees 1, 3; Tr. of Oral Arg. 20–21.

[50] Appellees' proof at trial focused on comparative differences in family incomes between residents of wealthy and poor districts. They endeavored, apparently, to show that there exists a direct correlation between personal family income and educational expenditures. See text, *infra,* at 25–27. The District Court may have been relying on this notion of relative discrimination based on family wealth. Citing appellees' statistical proof, the court emphasized that "those districts most rich in property also have the highest median family income . . . while the poor property districts are poor in income . . . ." 337 F. Supp., at 282.

[51] At oral argument and in their brief, appellees suggest that description of the personal status of the residents in districts that spend less on education is not critical to their case. In their view, the Texas system is impermissibly discriminatory even if relatively poor districts do not contain poor people. Brief for Appellees 43–44; Tr. of Oral Arg. 20–21. There are indications in the District Court opinion that it adopted this theory of district discrimination. The opinion repeatedly emphasizes the comparative financial status of districts and early in the opinion it describes appellees' class as being composed of "all . . . children throughout Texas who live in school districts with low property valuations." 337 F. Supp., at 281.

351 U. S. 12 (1956), and its progeny,[52] the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion *de facto* discrimination against those who, because of their indigency, were totally unable to pay for transcripts. And the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some "adequate substitute" for a full stenographic transcript. *Britt* v. *North Carolina,* 404 U. S. 226, 228 (1971); *Gardner* v. *California,* 393 U. S. 367 (1969); *Draper* v. *Washington,* 372 U. S. 487 (1963); *Eskridge* v. *Washington Prison Board,* 357 U. S. 214 (1958).

Likewise, in *Douglas* v. *California,* 372 U. S. 353 (1963), a decision establishing an indigent defendant's right to court-appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. *Douglas* provides no relief for those on whom the burdens of paying for a criminal defense are, relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

Williams v. *Illinois,* 399 U. S. 235 (1970), and *Tate* v. *Short,* 401 U. S. 395 (1971), struck down criminal penalties that subjected indigents to incarceration simply because of their inability to pay a fine. Again, the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.

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[52] *Mayer* v. *City of Chicago,* 404 U. S. 189 (1971); *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969); *Gardner* v. *California,* 393 U. S. 367 (1969); *Roberts* v. *LaVallee,* 389 U. S. 40 (1967); *Long* v. *District Court of Iowa,* 385 U. S. 192 (1966); *Draper* v. *Washington,* 372 U. S. 487 (1963); *Eskridge* v. *Washington Prison Board,* 357 U. S. 214 (1958).

Finally, in *Bullock* v. *Carter,* 405 U. S. 134 (1972), the Court invalidated the Texas filing-fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars and, in at least one case, as high as $8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided "no reasonable alternative means of access to the ballot" (*id.,* at 149), inability to pay occasioned an absolute denial of a position on the primary ballot.

Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing system—discrimination against a class of definably "poor" persons—might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the "poor," appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that "[i]t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts . . . . Thus, the major factual assumption of *Serrano*—that the educational financing system discriminates against the 'poor'—is simply false in Connecticut." [53] Defining "poor" families as those below the Bureau of the Census "poverty level," [54] the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts.[55] Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it,[56] a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.[57] Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an "adequate" education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to "guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.'"[58] The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures "every child in every school district an adequate education."[59] No proof was offered at trial persuasively discrediting or refuting the State's assertion.

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[53] Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L. J. 1303, 1328–1329 (1972).

[54] *Id.*, at 1324 and n. 102

[55] *Id.*, at 1328.

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[56] Each of appellees' possible theories of wealth discrimination is founded on the assumption that the quality of education varies directly with the amount of funds expended on it and that, therefore, the difference in quality between two schools can be determined simplistically by looking at the difference in per-pupil expenditures. This is a matter of considerable dispute among educators and commentators. See nn. 86 and 101, *infra*.

[57] *E. g., Bullock* v. *Carter,* 405 U. S., at 137, 149; *Mayer* v. *City of Chicago,* 404 U. S., at 194; *Draper* v. *Washington,* 372 U. S., at 495–496; *Douglas* v. *California,* 372 U. S., at 357.

[58] Gilmer-Aikin Committee, *supra,* n. 15, at 13. Indeed, even though local funding has long been a significant aspect of educational funding, the State has always viewed providing an acceptable education as one of its primary functions. See Texas State Bd. of Educ., *supra,* n. 11, at 1, 7.

[59] Brief for Appellants 35; Reply Brief for Appellants 1.

For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.[60]

As suggested above, appellees and the District Court may have embraced a second or third approach, the second of which might be characterized as a theory of relative or comparative discrimination based on family income. Appellees sought to prove that a direct correlation exists between the wealth of families within each district and the expenditures therein for education. That is, along a continuum, the poorer the family the lower the dollar amount of education received by the family's children.

The principal evidence adduced in support of this comparative-discrimination claim is an affidavit submitted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. The District Court, relying in major part upon this affidavit and apparently accepting the substance of appellees' theory, noted, first, a positive correlation between the wealth of school districts, measured in terms of assessable property per pupil, and their levels of per-pupil expenditures. Second, the court found a similar correlation between district wealth and the personal wealth of its residents, measured in terms of median family income. 337 F. Supp., at 282 n. 3.

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[60] An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding and by the local assessment program the disparities in local tax resources.

If, in fact, these correlations could be sustained, then it might be argued that expenditures on education—equated by appellees to the quality of education—are dependent on personal wealth. Appellees' comparative-discrimination theory would still face serious unanswered questions, including whether a bare positive correlation or some higher degree of correlation[61] is necessary to provide a basis for concluding that the financing system is designed to operate to the peculiar disadvantage of the comparatively poor,[62] and whether a class of this size and diversity could ever claim the special protection accorded "suspect" classes. These questions need not be addressed in this case, however, since appellees' proof fails to support their allegations or the District Court's conclusions.

Professor Berke's affidavit is based on a survey of approximately 10% of the school districts in Texas. His findings, previously set out in the margin,[63] show only that the wealthiest few districts in the sample have the highest median family incomes and spend the most on education, and that the several poorest districts have the lowest family incomes and devote the least amount of money to education. For the remainder of the districts—96 districts composing almost 90% of the sample—the correlation is inverted, *i. e.*, the districts that spend next to the most money on education are populated by families having next to the lowest median family incomes while the districts spending the least have the highest median family incomes. It is evident that, even if the conceptual questions were answered favorably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination.[64]

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[61] Also, it should be recognized that median income statistics may not define with any precision the status of individual families within any given district. A more dependable showing of comparative wealth discrimination would also examine factors such as the average income, the mode, and the concentration of poor families in any district.

[62] Cf. *Jefferson* v. *Hackney*, 406 U. S. 535, 547–549 (1972); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1258–1259 (1970); Simon, The School Finance Decisions: Collective Bargaining and Future Finance Systems, 82 Yale L. J. 409, 439–440 (1973).

[63] *Supra*, at 15 n. 38.

This brings us, then, to the third way in which the classification scheme might be defined—*district* wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures from top to bottom, the disadvantaged class might be viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the most on education.[65] Alternatively, as suggested in MR. JUSTICE MARSHALL's dissenting opinion, *post,* at 96, the class might be defined more restrictively to include children in districts with assessable property which falls below the statewide average, or median, or below some other artificially defined level.

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[64] Studies in other States have also questioned the existence of any dependable correlation between a district's wealth measured in terms of assessable property and the collective wealth of families residing in the district measured in terms of median family income. Ridenour & Ridenour, Serrano v. Priest: Wealth and Kansas School Finance, 20 Kan. L. Rev. 213, 225 (1972) ("it can be argued that there exists in Kansas almost an inverse correlation: districts with highest income per pupil have low assessed value per pupil, and districts with high assessed value per pupil have low income per pupil"); Davis, Taxpaying Ability: A Study of the Relationship Between Wealth and Income in California Counties, in The Challenge of Change in School Finance, 10th Nat. Educational Assn. Conf. on School Finance 199 (1967). Note, 81 Yale L. J., *supra*, n. 53. See also Goldstein, *supra*, n. 38, at 522–527.

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.[66] The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class.

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[65] Indeed, this is precisely how the plaintiffs in *Serrano* v. *Priest* defined the class they purported to represent: "Plaintiff children claim to represent a class consisting of all public school pupils in California, 'except children in that school district . . . which . . . affords the greatest educational opportunity of all school districts within California.'" 5 Cal. 3d, at 589, 487 P. 2d, at 1244. See also *Van Dusartz* v. *Hatfield,* 334 F. Supp., at 873.

[66] Appellees, however, have avoided describing the Texas system as one resulting merely in discrimination between districts *per se* since this Court has never questioned the State's power to draw reasonable distinctions between political subdivisions within its borders. *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218, 230-231 (1964); *McGowan* v. *Maryland,* 366 U. S. 420, 427 (1961); *Salsburg* v. *Maryland,* 346 U. S. 545, 552 (1954).

But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention.[67] They also assert that the State's system impermissibly interferes with the exercise of a "fundamental" right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. *Graham* v. *Richardson,* 403 U. S. 365, 375–376 (1971); *Kramer* v. *Union School District,* 395 U. S. 621 (1969); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.[68]

B

In *Brown* v. *Board of Education,* 347 U. S. 483 (1954), a unanimous Court recognized that "education is perhaps the most important function of state and local governments." *Id.,* at 493. What was said there in the context of racial discrimination has lost none of its vitality with the passage of time:

> "Compulsory school attendance laws and the great expenditures for education both demonstrate our

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[67] *E. g., Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966); *United States* v. *Kras,* 409 U. S. 434 (1973). See MR. JUSTICE MARSHALL's dissenting opinion, *post,* at 121.

[68] See *Serrano* v. *Priest, supra; Van Dusartz* v. *Hatfield, supra; Robinson* v. *Cahill,* 118 N. J. Super. 223, 287 A. 2d 187 (1972); Coons, Clune & Sugarman, *supra,* n. 13, at 339–393; Goldstein, *supra,* n. 38, at 534–541; Vieira, Unequal Educational Expenditures: Some Minority Views on *Serrano* v. *Priest,* 37 Mo. L. Rev. 617, 618–624 (1972); Comment, Educational Financing, Equal Protection of the Laws, and the Supreme Court, 70 Mich. L. Rev. 1324, 1335–1342 (1972); Note, The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination, 14 Ariz. L. Rev. 88, 120–124 (1972).

> recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Ibid.*

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided. *Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (BURGER, C. J.), 237, 238–239 (WHITE, J.), (1972); *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 230 (1963) (BRENNAN, J.); *McCollum* v. *Board of Education,* 333 U. S. 203, 212 (1948) (Frankfurter, J.); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Interstate Consolidated Street R. Co.* v. *Massachusetts,* 207 U. S. 79 (1907).

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted.[69] But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice

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[69] 337 F. Supp., at 283.

Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." *Shapiro* v. *Thompson,* 394 U. S., at 655, 661. In his view, if the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature.'" *Ibid.* We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence. But MR. JUSTICE STEWART's response in *Shapiro* to Mr. Justice Harlan's concern correctly articulates the limits of the fundamental-rights rationale employed in the Court's equal protection decisions:

> "The Court today does *not* 'pick out particular human activities, characterize them as "fundamental," and give them added protection . . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." *Id.,* at 642. (Emphasis in original.)

MR. JUSTICE STEWART's statement serves to underline what the opinion of the Court in *Shapiro* makes clear. In subjecting to strict judicial scrutiny state welfare eligibility statutes that imposed a one-year durational residency requirement as a precondition to receiving AFDC benefits, the Court explained:

> "[I]n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Id.,* at 634. (Emphasis in original.)

The right to interstate travel had long been recognized as a right of constitutional significance,[70] and the Court's decision, therefore, did not require an ad hoc determination as to the social or economic importance of that right.[71]

Lindsey v. *Normet,* 405 U. S. 56 (1972), decided only last Term, firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. The complainants in that case, involving a challenge to the procedural limitations imposed on tenants in suits brought by landlords under Oregon's Forcible Entry and Wrongful Detainer Law, urged the Court to examine the operation of the statute under "a more stringent standard than mere rationality." *Id.,* at 73. The tenants argued that the statutory limitations implicated "fundamental interests which are particularly important to the poor," such as the " 'need for decent shelter' " and the " 'right to retain peaceful possession of one's home.' " *Ibid.* MR. JUSTICE WHITE's analysis, in his opinion for the Court, is instructive:

> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access

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[70] *E. g., United States* v. *Guest,* 383 U. S. 745, 757–759 (1966); *Oregon* v. *Mitchell,* 400 U. S. 112, 229, 237–238 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

[71] After *Dandridge* v. *Williams,* 397 U. S. 471 (1970), there could be no lingering question about the constitutional foundation for the Court's holding in *Shapiro.* In *Dandridge,* the Court applied the rational-basis test in reviewing Maryland's maximum family grant provision under its AFDC program. A federal district court held the provision unconstitutional, applying a stricter standard of review. In the course of reversing the lower court, the Court distinguished *Shapiro* properly on the ground that in that case "the Court found state interference with the constitutionally protected freedom of interstate travel." *Id.,* at 484 n. 16.

> to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent . . . . *Absent constitutional mandate,* the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." *Id.,* at 74. (Emphasis supplied.)

Similarly, in *Dandridge* v. *Williams,* 397 U. S. 471 (1970), the Court's explicit recognition of the fact that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings," *id.,* at 485,[72] provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. As in the case of housing, the central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest. See also *Jefferson* v. *Hackney,* 406 U. S. 535 (1972); *Richardson* v. *Belcher,* 404 U. S. 78 (1971).

The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972);[73] *Dunn* v. *Blumstein,* 405 U. S. 330 (1972);[74] *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972);[75] *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942).[76]

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[72] The Court refused to apply the strict-scrutiny test despite its contemporaneous recognition in *Goldberg* v. *Kelly,* 397 U. S. 254, 264 (1970) that "welfare provides the means to obtain essential food, clothing, housing, and medical care."

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[73] In *Eisenstadt,* the Court struck down a Massachusetts statute that prohibited the distribution of contraceptive devices, finding that the law failed "to satisfy even the more lenient equal protection standard." 405 U. S., at 447 n. 7. Nevertheless, in *dictum,* the Court recited the correct form of equal protection analysis: "[I]f we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold* [v. *Connecticut,* 381 U. S. 479 (1965)], the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest." *Ibid.* (emphasis in original).

[74] *Dunn* fully canvasses this Court's voting rights cases and explains that "this Court has made clear that a citizen has a *constitutionally protected right* to participate in elections on an equal basis with other citizens in the jurisdiction." 405 U. S., at 336 (emphasis supplied). The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though, as the Court noted in *Harper* v. *Virginia Bd. of Elections,* 383 U. S., at 665, "the right to vote in state elections is nowhere expressly mentioned." See *Oregon* v. *Mitchell,* 400 U. S., at 135, 138–144 (DOUGLAS, J.), 229, 241–242 (BRENNAN, WHITE, and MARSHALL, JJ.); *Bullock* v. *Carter,* 405 U. S., at 140–144; *Kramer* v. *Union School District,* 395 U. S. 621, 625–630 (1969); *Williams* v. *Rhodes,* 393 U. S. 23, 29, 30–31 (1968); *Reynolds* v. *Sims,* 377 U. S. 533, 554–562 (1964); *Gray* v. *Sanders,* 372 U. S. 368, 379–381 (1963).

[75] In *Mosley,* the Court struck down a Chicago antipicketing ordinance that exempted labor picketing from its prohibitions. The ordinance was held invalid under the Equal Protection Clause after subjecting it to careful scrutiny and finding that the ordinance was not narrowly drawn. The stricter standard of review was appropriately applied since the ordinance was one "affecting First Amendment interests." 408 U. S., at 101.

[76] *Skinner* applied the standard of close scrutiny to a state law permitting forced sterilization of "habitual criminals." Implicit in the Court's opinion is the recognition that the right of procreation is among the rights of personal privacy protected under the Constitution. See *Roe* v. *Wade,* 410 U. S. 113, 152 (1973).

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information[77] becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote.[78] Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

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[77] See, *e. g., Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 389–390 (1969); *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969); *Lamont* v. *Postmaster General,* 381 U. S. 301, 306–307 (1965).

[78] Since the right to vote, *per se,* is not a constitutionally protected right, we assume that appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population. See n. 74, *supra.*

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted.[79] These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

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[79] The States have often pursued their entirely legitimate interest in assuring "intelligent exercise of the franchise," *Katzenbach* v. *Morgan,* 384 U. S. 641, 655 (1966), through such devices as literacy tests and age restrictions on the right to vote. See *ibid.; Oregon* v. *Mitchell,* 400 U. S. 112 (1970). And, where those restrictions have been found to promote intelligent use of the ballot without discriminating against those racial and ethnic minorities previously deprived of an equal educational opportunity, this Court has upheld their use. Compare *Lassiter* v. *Northampton County Bd. of Elections,* 360 U. S. 45 (1959), with *Oregon* v. *Mitchell, supra,* at 133 (Black, J.), 135, 144–147 (DOUGLAS, J.), 152, 216–217 (Harlan, J.), 229, 231–236 (BRENNAN, WHITE, and MARSHALL, JJ.), 281, 282–284 (STEWART, J.), and *Gaston County* v. *United States,* 395 U. S. 285 (1969).

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.[80] If so, appellees' thesis would cast serious doubt on the authority of *Dandridge* v. *Williams, supra,* and *Lindsey* v. *Normet, supra.*

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. See *Skinner* v. *Oklahoma, supra,* at 536; *Shapiro* v. *Thompson, supra,* at 634; *Dunn* v. *Blumstein, supra,* at 338–343. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. MR. JUSTICE BRENNAN, writing for the Court in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), expresses well the salient point:[81]

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[80] See Schoettle, The Equal Protection Clause in Public Education, 71 Col. L. Rev. 1355, 1389–1390 (1971); Vieira, *supra,* n. 68, at 622–623; Comment, Tenant Interest Representation: Proposal for a National Tenants' Association, 47 Tex. L. Rev. 1160, 1172–1173, n. 61 (1969).

> "This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected [to others similarly situated] . . . .
>
> "[The federal law in question] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. . . . We need only decide whether the challenged limitation on the relief effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is

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[81] *Katzenbach* v. *Morgan* involved a challenge by registered voters in New York City to a provision of the Voting Rights Act of 1965 that prohibited enforcement of a state law calling for English literacy tests for voting. The law was suspended as to residents from Puerto Rico who had completed at least six years of education at an "American-flag" school in that country even though the language of instruction was other than English. This Court upheld the questioned provision of the 1965 Act over the claim that it discriminated against those with a sixth-grade education obtained in non-English-speaking schools other than the ones designated by the federal legislation.

> inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' . . . that a legislature need not 'strike at all evils at the same time,' . . . and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . .' " *Id.,* at 656–657. (Emphasis in original.)

The Texas system of school financing is not unlike the federal legislation involved in *Katzenbach* in this regard. Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid—was implemented in an effort to *extend* public education and to improve its quality.[82] Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.[83]

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[82] Cf. *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Hargrave* v. *Kirk,* 313 F. Supp. 944 (MD Fla. 1970), vacated, 401 U. S. 476 (1971).

[83] See *Schilb* v. *Kuebel,* 404 U. S. 357 (1971); *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969).

C

It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.

We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.[84] This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause:

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax poli-

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[84] See, *e. g., Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232 (1890); *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 508-509 (1937); *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522 (1959).

> cies. . . . It has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . ." *Madden* v. *Kentucky,* 309 U. S. 83, 87-88 (1940).

See also *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U. S. 356 (1973); *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 445 (1940).

Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.[85]

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[85] Those who urge that the present system be invalidated offer little guidance as to what type of school financing should replace it. The most likely result of rejection of the existing system would be statewide financing of all public education with funds derived from taxation of property or from the adoption or expansion of sales and income taxes. See Simon, *supra,* n. 62. The authors of Private Wealth and Public Education, *supra,* n. 13, at 201-242, suggest an

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge* v. *Williams,* 397 U. S., at 487. The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. *Jefferson* v. *Hackney,* 406 U. S., at 546–547. On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major

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alternative scheme, known as "district power equalizing." In simplest terms, the State would guarantee that at any particular rate of property taxation the district would receive a stated number of dollars regardless of the district's tax base. To finance the subsidies to "poorer" districts, funds would be taken away from the "wealthier" districts that, because of their higher property values, collect more than the stated amount at any given rate. This is not the place to weigh the arguments for and against "district power equalizing," beyond noting that commentators are in disagreement as to whether it is feasible, how it would work, and indeed whether it would violate the equal protection theory underlying appellees' case. President's Commission on School Finance, Schools, People, & Money 32–33 (1972); Bateman & Brown, Some Reflections on *Serrano* v. *Priest,* 49 J. Urban L. 701, 706–708 (1972); Brest, Book Review, 23 Stan. L. Rev. 591, 594–596 (1971); Goldstein, *supra,* n. 38, at 542–543; Wise, School Finance Equalization Lawsuits: A Model Legislative Response, 2 Yale Rev. of L. & Soc. Action 123, 125 (1971); Silard & White, Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause, 1970 Wis. L. Rev. 7, 29–30.

sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education [86]—an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education.[87] And the question regarding the most effective relationship beween state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

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[86] The quality-cost controversy has received considerable attention. Among the notable authorities on both sides are the following: C. Jencks, Inequality (1972); C. Silberman, Crisis in the Classroom (1970); U. S. Office of Education, Equality of Educational Opportunity (1966) (the Coleman Report); On Equality of Educational Opportunity (F. Mosteller & D. Moynihan eds. 1972); J. Guthrie, G. Kleindorfer, H. Levin & R. Stout, Schools and Inequality (1971); President's Commission on School Finance, *supra,* n. 85; Swanson, The Cost-Quality Relationship, in The Challenge of Change in School Finance, 10th Nat. Educational Assn. Conf. on School Finance 151 (1967).

[87] See the results of the Texas Governor's Committee's statewide survey on the goals of education in that State. 1 Governor's Committee Report 59–68. See also Goldstein, *supra,* n. 38, at 519–522; Schoettle, *supra,* n. 80; authorities cited in n. 86, *supra.*

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,"[88] it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

III

The basic contours of the Texas school finance system have been traced at the outset of this opinion. We will now describe in more detail that system and how it operates, as these facts bear directly upon the demands of the Equal Protection Clause.

Apart from federal assistance, each Texas school receives its funds from the State and from its local school district. On a statewide average, a roughly comparable amount of funds is derived from each source.[89] The State's contribution, under the Minimum Foundation Program, was designed to provide an adequate minimum educational offering in every school in the State. Funds are distributed to assure that there will be one teacher—compensated at the state-supported minimum salary—for every 25 students.[90] Each school district's other supportive personnel are provided for: one principal for every 30 teachers;[91] one "special service" teacher—librarian, nurse, doctor, etc.—for every 20 teachers;[92] superintendents, vocational instructors, counselors, and educators for exceptional children are also provided.[93] Additional funds are earmarked for current operating expenses, for student transportation,[94] and for free textbooks.[95]

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[88] *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 530, 532 (1959) (BRENNAN, J., concurring); *Katzenbach* v. *Morgan*, 384 U. S., at 659, 661 (Harlan, J., dissenting).

The program is administered by the State Board of Education and by the Central Education Agency, which also have responsibility for school accreditation[96] and for monitoring the statutory teacher-qualification standards.[97] As reflected by the 62% increase in funds allotted to the Edgewood School District over the last three years,[98] the State's financial contribution to education is steadily increasing. None of Texas' school districts, however, has been content to rely alone on funds from the Foundation Program.

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[89] In 1970 Texas expended approximately $2.1 billion for education and a little over $1 billion came from the Minimum Foundation Program. Texas Research League, *supra,* n. 20, at 2.

[90] Tex. Educ. Code Ann. § 16.13 (1972).

[91] *Id.,* § 16.18.

[92] *Id.,* § 16.15.

[93] *Id.,* §§ 16.16, 16.17, 16.19

[94] *Id.,* §§ 16.45, 16.51–16.63.

[95] *Id.,* §§ 12.01–12.04.

[96] *Id.,* § 11.26 (5).

[97] *Id.,* § 16.301 *et seq.*

[98] See *supra,* at 13–14.

By virtue of the obligation to fulfill its Local Fund Assignment, every district must impose an ad valorem tax on property located within its borders. The Fund Assignment was designed to remain sufficiently low to assure that each district would have some ability to provide a more enriched educational program.[99] Every district supplements its Foundation grant in this manner. In some districts, the local property tax contribution is insubstantial, as in Edgewood where the supplement was only $26 per pupil in 1967. In other districts, the local share may far exceed even the total Foundation grant. In part, local differences are attributable to differences in the rates of taxation or in the degree to which the market value for any category of property varies from its assessed value.[100] The greatest interdistrict disparities, however, are attributable to differences in the amount of assessable property available within any district. Those districts that have more property, or more valuable property, have a greater capability for supplementing state funds. In large measure, these additional local revenues are devoted to paying higher salaries to more teachers. Therefore, the primary distinguishing attributes of schools in property-affluent districts are lower pupil-teacher ratios and higher salary schedules.[101]

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[99] Gilmer-Aikin Committee, *supra*, n. 15, at 15.

[100] There is no uniform statewide assessment practice in Texas. Commercial property, for example, might be assessed at 30% of market value in one county and at 50% in another. 5 Governor's Committee Report 25–26; Berke, Carnevale, Morgan & White, *supra*, n. 29, at 666–667, n. 16.

[101] Texas Research League, *supra*, n. 20, at 18. Texas, in this regard, is not unlike most other States. One commentator has observed that "disparities in expenditures appear to be largely ex-

This, then, is the basic outline of the Texas school financing structure. Because of differences in expenditure levels occasioned by disparities in property tax income, appellees claim that children in less affluent districts have been made the subject of invidious discrimination. The District Court found that the State had failed even "to establish a reasonable basis" for a system that results in different levels of per-pupil expenditure. 337 F. Supp., at 284. We disagree.

In its reliance on state as well as local resources, the Texas system is comparable to the systems employed

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plained by variations in teacher salaries." Simon, *supra,* n. 62, at 413.

As previously noted, see text accompanying n. 86, *supra,* the extent to which the quality of education varies with expenditure per pupil is debated inconclusively by the most thoughtful students of public education. While all would agree that there is a correlation up to the point of providing the recognized essentials in facilities and academic opportunities, the issues of greatest disagreement include the effect on the quality of education of pupil-teacher ratios and of higher teacher salary schedules. *E. g.,* Office of Education, *supra,* n. 86, at 316–319. The state funding in Texas is designed to assure, on the average, one teacher for every 25 students, which is considered to be a favorable ratio by most standards. Whether the minimum salary of $6,000 per year is sufficient in Texas to attract qualified teachers may be more debatable, depending in major part upon the location of the school district. But there appear to be few empirical data that support the advantage of any particular pupil-teacher ratio or that document the existence of a dependable correlation between the level of public school teachers' salaries and the quality of their classroom instruction. An intractable problem in dealing with teachers' salaries is the absence, up to this time, of satisfactory techniques for judging their ability or performance. Relatively few school systems have merit plans of any kind, with the result that teachers' salaries are usually increased across the board in a way which tends to reward the least deserving on the same basis as the most deserving. Salaries are usually raised automatically on the basis of length of service and according to predetermined "steps," extending over 10- to 12-year periods.

in virtually every other State.[102] The power to tax local property for educational purposes has been recognized in Texas at least since 1883.[103] When the growth of commercial and industrial centers and accompanying shifts in population began to create disparities in local resources, Texas undertook a program calling for a considerable investment of state funds.

The "foundation grant" theory upon which Texas legislators and educators based the Gilmer-Aikin bills, was a product of the pioneering work of two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig.[104] Their efforts were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local participation. The Strayer-Haig thesis represented an accommodation between these two competing forces. As articulated by Professor Coleman:

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[102] President's Commission on School Finance, *supra*, n. 85, at 9. Until recently, Hawaii was the only State that maintained a purely state-funded educational program. In 1968, however, that State amended its educational finance statute to permit counties to collect additional funds locally and spend those amounts on its schools. The rationale for that recent legislative choice is instructive on the question before the Court today:

"Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the State's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government." Haw. Sess. Laws 1968, Act 38, § 1.

[103] See text accompanying n. 7, *supra*.

[104] G. Strayer & R. Haig, The Financing of Education in the State of New York (1923). For a thorough analysis of the contribution of these reformers and of the prior and subsequent history of educational finance, see Coons, Clune & Sugarman, *supra*, n. 13, at 39–95.

> "The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children."[105]

The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright* v. *Council of the City of Emporia,* 407 U. S. 451 (1972). MR. JUSTICE STEWART stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Id.,* at 469. THE CHIEF JUSTICE, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Id.,* at 478.

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments."[106] No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

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[105] J. Coleman, Foreword to Strayer & Haig, *supra,* at vii.

Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in educational expenditures. While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others,[107] the existence of "some inequality" in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. *McGowan* v. *Maryland,* 366 U. S. 420, 425–426 (1961). It may not be condemned simply because it imperfectly effectuates the State's goals. *Dandridge* v. *Williams,* 397 U. S., at 485. Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion "less drastic" disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative. Cf. *Dunn* v. *Blumstein,* 405 U. S., at 343; *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960). It is also well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools.[108] The people of Texas may be

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[106] *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 311 (1932) (Brandeis, J., dissenting).

[107] MR. JUSTICE WHITE suggests in his dissent that the Texas system violates the Equal Protection Clause because the means it has selected to effectuate its interest in local autonomy fail to guarantee complete freedom of choice to every district. He places special emphasis on the statutory provision that establishes a maximum rate of $1.50 per $100 valuation at which a local school district may tax for school maintenance. Tex. Educ. Code Ann. § 20.04 (d) (1972). The maintenance rate in Edgewood when this case was litigated in the District Court was $.55 per $100, barely one-third of the allowable rate. (The tax rate of $1.05 per $100, see *supra*, at 12, is the equalized

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rate for maintenance and for the retirement of bonds.) Appellees do not claim that the ceiling presently bars desired tax increases in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not before us and must await litigation in a case in which it is properly presented. Cf. *Hargrave* v. *Kirk,* 313 F. Supp. 944 (MD Fla. 1970), vacated, 401 U. S. 476 (1971).

[108] MR. JUSTICE MARSHALL states in his dissenting opinion that the State's asserted interest in local control is a "mere sham," *post,* at 130, and that it has been offered, not as a legitimate justification, but "as an excuse . . . for interdistrict inequality." *Id.,* at 126. In addition to asserting that local control would be preserved and possibly better served under other systems—a consideration that we find irrelevant for the purpose of deciding whether the system may be said to be supported by a legitimate and reasonable basis—the dissent suggests that Texas' lack of good faith may be demonstrated

justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe

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by examining the extent to which the State already maintains considerable control. The State, we are told, regulates "the most minute details of local public education," *ibid.*, including textbook selection, teacher qualifications, and the length of the school day. This assertion, that genuine local control does not exist in Texas, simply cannot be supported. It is abundantly refuted by the elaborate statutory division of responsibilities set out in the Texas Education Code. Although policy decisionmaking and supervision in certain areas are reserved to the State, the day-to-day authority over the "management and control" of all public elementary and secondary schools is squarely placed on the local school boards. Tex. Educ. Code Ann. §§ 17.01, 23.26 (1972). Among the innumerable specific powers of the local school authorities are the following: the power of eminent domain to acquire land for the construction of school facilities, *id.*, §§ 17.26, 23.26; the power to hire and terminate teachers and other personnel, *id.*, §§ 13.101–13.103; the power to designate conditions of teacher employment and to establish certain standards of educational policy, *id.*, § 13.901; the power to maintain order and discipline, *id.*, § 21.305, including the prerogative to suspend students for disciplinary reasons, *id.*, § 21.301; the power to decide whether to offer a kindergarten program, *id.*, §§ 21.131–21.135, or a vocational training program, *id.*, § 21.111, or a program of special education for the handicapped, *id.*, § 11.16; the power to control the assignment and transfer of students, *id.*, §§ 21.074–21.080; and the power to operate and maintain a school bus program, *id.*, § 16.52. See also *Pervis* v. *LaMarque Ind. School Dist.*, 328 F. Supp. 638, 642–643 (SD Tex. 1971), reversed, 466 F. 2d 1054 (CA5 1972); *Nichols* v. *Aldine Ind. School Dist.*, 356 S. W. 2d 182 (Tex. Civ. App. 1962). Local school boards also determine attendance zones, location of new schools, closing of old ones, school attendance hours (within limits), grading and promotion policies subject to general guidelines, recreational and athletic policies, and a myriad of other matters in the routine of school administration. It cannot be seriously doubted that in Texas education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools is made and executed at the local level, guaranteeing the greatest participation by those most directly concerned.

that along with increased control of the purse strings at the state level will go increased control over local policies.[109]

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on "happenstance." They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others.[110] Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.

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[109] This theme—that greater state control over funding will lead to greater state power with respect to local educational programs and policies—is a recurrent one in the literature on financing public education. Professor Simon, in his thoughtful analysis of the political ramifications of this case, states that one of the most likely consequences of the District Court's decision would be an increase in the centralization of school finance and an increase in the extent of collective bargaining by teacher unions at the state level. He suggests that the subjects for bargaining may include many "non-salary" items, such as teaching loads, class size, curricular and program choices, questions of student discipline, and selection of administrative personnel—matters traditionally decided heretofore at the local level. Simon, *supra,* n. 62, at 434–436. See, *e. g.,* Coleman, The Struggle for Control of Education, in Education and Social Policy: Local Control of Education 64, 77–79 (C. Bowers, I. Housego & D. Dyke eds. 1970); J. Conant, The Child, The Parent, and The State 27 (1959) ("Unless a local community, through its school board, has some control over the purse, there can be little real feeling in the community that the schools are in fact local schools . . ."); Howe, Anatomy of a Revolution, in Saturday Review 84, 88 (Nov. 20, 1971) ("It is an axiom of American politics that control and power follow money . . ."); R. Hutchinson, State-Administered Locally-Shared Taxes 21 (1931) ("[S]tate administration of taxation is the first step toward state control of the functions supported by these taxes . . ."). Irrespective of whether one regards such prospects as detrimental, or whether he agrees that the consequence is inevitable, it certainly cannot be doubted that there is a rational basis for this concern on the part of parents, educators, and legislators.

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. Texas has acknowledged its shortcomings and has persistently endeavored—not without some success—to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled, *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911), it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions. *Metropolis Theatre Co.* v. *City of Chicago,* 228 U. S. 61, 69–70 (1913). One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *McGinnis* v. *Royster,* 410 U. S. 263, 270 (1973). We hold that the Texas plan abundantly satisfies this standard.

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[110] This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any *per se* rule of "territorial uniformity." *McGowan* v. *Maryland,* 366 U. S., at 427. See also *Griffin* v. *County School Board of Prince Edward County,* 377 U. S., at 230–231; *Salsburg* v. *Maryland,* 346 U. S. 545 (1954). Cf. *Board of Education of Muskogee* v. *Oklahoma,* 409 F. 2d 665, 668 (CA10 1969).

IV

In light of the considerable attention that has focused on the District Court opinion in this case and on its California predecessor, *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P. 2d 1241 (1971), a cautionary postscript seems appropriate. It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability of completely uprooting the existing system.

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable question [111]—these groups stand to realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, *i. e.,* in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts.[112] Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts.[113] Additionally,

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[111] Any alternative that calls for significant increases in expenditures for education, whether financed through increases in property taxation or through other sources of tax dollars, such as income and

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sales taxes, is certain to encounter political barriers. At a time when nearly every State and locality is suffering from fiscal undernourishment, and with demands for services of all kinds burgeoning and with weary taxpayers already resisting tax increases, there is considerable reason to question whether a decision of this Court nullifying present state taxing systems would result in a marked increase in the financial commitment to education. See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., Toward Equal Educational Opportunity 339–345 (Comm. Print 1972); Berke & Callahan, *Serrano* v. *Priest:* Milestone or Millstone for School Finance, 21 J. Pub. L. 23, 25–26 (1972); Simon, *supra,* n. 62, at 420–421. In Texas, it has been calculated that $2.4 billion of additional school funds would be required to bring all schools in that State up to the present level of expenditure of all but the wealthiest districts—an amount more than double that currently being spent on education. Texas Research League, *supra,* n. 20, at 16–18. An *amicus curiae* brief filed on behalf of almost 30 States, focusing on these practical consequences, claims with some justification that "each of the undersigned states . . . would suffer severe financial stringency." Brief of *Amici Curiae* in Support of Appellants 2 (filed by Montgomery County, Md., et al.).

[112] See Note, *supra,* n. 53. See also authorities cited n. 114, *infra.*

[113] See Goldstein, *supra,* n. 38, at 526; Jencks, *supra,* n. 86, at 27; U. S. Comm'n on Civil Rights, Inequality in School Financing: The Role of the Law 37 (1972). Coons, Clune & Sugarman, *supra,* n. 13, at 356–357, n. 47, have noted that in California, for example, "[f]ifty-nine percent . . . of minority students live in districts above the median [average valuation per pupil.]" In Bexar County, the largest district by far—the San Antonio Independent School District—is above the local average in both the amount of

several research projects have concluded that any financing alternative designed to achieve a greater equality of expenditures is likely to lead to higher taxation and lower educational expenditures in the major urban centers,[114] a result that would exacerbate rather than ameliorate existing conditions in those areas.

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already

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taxable wealth per pupil and in median family income. Yet 72% of its students are Mexican-Americans. And, in 1967–1968 it spent only a very few dollars less per pupil than the North East and North Side Independent School Districts, which have only 7% and 18% Mexican-American enrollment respectively. Berke, Carnevale, Morgan & White, *supra*, n. 29, at 673.

[114] See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., Issues in School Finance 129 (Comm. Print 1972) (monograph entitled Inequities in School Finance prepared by Professors Berke and Callahan); U. S. Office of Education, Finances of Large-City School Systems: A Comparative Analysis (1972) (HEW publication); U. S. Comm'n on Civil Rights, *supra*, n. 113, at 33–36; Simon, *supra*, n. 62, at 410–411, 418.

have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed.

MR. JUSTICE STEWART, concurring.

The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust.[1] It does not follow, however, and I cannot find, that this system violates the Constitution of the United States. I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment. The uncharted directions of such a departure are suggested, I think, by the imaginative dissenting opinion my Brother MARSHALL has filed today.

Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties.[2] The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.

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[1] See New York Times, Mar. 11, 1973, p. 1, col. 1.

[2] There is one notable exception to the above statement: It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, *e. g., Reynolds* v. *Sims,* 377 U. S. 533; *Kramer* v. *Union School District,* 395 U. S. 621; *Dunn* v. *Blumstein,* 405 U. S. 330, 336. But there is no constitutional right to vote, as such. *Minor* v. *Happersett,* 21 Wall. 162. If there were such a right, both the Fifteenth Amendment and the Nineteenth Amendment would have been wholly unnecessary.

There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes.[3] And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious. See, *e. g., Rinaldi* v. *Yeager,* 384 U. S. 305. This settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in *McGowan* v. *Maryland,* 366 U. S. 420, 425–426, in the following words:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

This doctrine is no more than a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law. See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

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[3] But see *Bullock* v. *Carter,* 405 U. S. 134.

Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently "suspect." Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. See, *e. g., Brown* v. *Board of Education,* 347 U. S. 483; *McLaughlin* v. *Florida,* 379 U. S. 184. But there are other classifications that, at least in some settings, are also "suspect"—for example, those based upon national origin,[4] alienage,[5] indigency,[6] or illegitimacy.[7]

Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. For example, a law that provided that newspapers could be published only by people who had resided in the State for five years could be superficially viewed as invidiously discriminating against an identifiable class in violation of the Equal Protection Clause. But, more basically, such a law would be invalid simply because it abridged the freedom of the press. Numerous cases in this Court illustrate this principle.[8]

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[4] See *Oyama* v. *California,* 332 U. S. 633, 644–646.

[5] See *Graham* v. *Richardson,* 403 U. S. 365, 372.

[6] See *Griffin* v. *Illinois,* 351 U. S. 12. "Indigency" means actual or functional indigency; it does not mean comparative poverty *vis-à-vis* comparative affluence. See *James* v. *Valtierra,* 402 U. S. 137.

[7] See *Gomez* v. *Perez,* 409 U. S. 535; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164.

[8] See, *e. g., Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (free speech); *Shapiro* v. *Thompson,* 394 U. S. 618 (freedom of interstate travel); *Williams* v. *Rhodes,* 393 U. S. 23 (freedom of association); *Skinner* v. *Oklahoma,* 316 U. S. 535 ("liberty" conditionally protected by Due Process Clause of Fourteenth Amendment).

In refusing to invalidate the Texas system of financing its public schools, the Court today applies with thoughtfulness and understanding the basic principles I have so sketchily summarized. First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable under the Equal Protection Clause.[9] Second, even assuming the existence of such discernible categories, the classifications are in no sense based upon constitutionally "suspect" criteria. Third, the Texas system does not rest "on grounds wholly irrelevant to the achievement of the State's objective." Finally, the Texas system impinges upon no substantive constitutional rights or liberties. It follows, therefore, under the established principle reaffirmed in Mr. Chief Justice Warren's opinion for the Court in *McGowan* v. *Maryland, supra,* that the judgment of the District Court must be reversed.

MR. JUSTICE BRENNAN, dissenting.

Although I agree with my Brother WHITE that the Texas statutory scheme is devoid of any rational basis, and for that reason is violative of the Equal Protection Clause, I also record my disagreement with the Court's rather distressing assertion that a right may be deemed "fundamental" for the purposes of equal protection analysis only if it is "explicitly or implicitly guaranteed by the Constitution." *Ante,* at 33–34. As my Brother MARSHALL convincingly demonstrates, our prior cases stand for the proposition that "fundamentality" is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly." *Post,* at 102–103.

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[9] See *Katzenbach* v. *Morgan,* 384 U. S. 641, 660 (Harlan, J., dissenting).

Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. See *post,* at 111–115. This being so, any classification affecting education must be subjected to strict judicial scrutiny, and since even the State concedes that the statutory scheme now before us cannot pass constitutional muster under this stricter standard of review, I can only conclude that the Texas school-financing scheme is constitutionally invalid.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds.[1] Concededly, the system yields wide disparity in per-pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per pupil.[2] The majority and the State concede, as they must, the existence of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed "to provide an adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able . . . . It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much."[3] The majority advances this rationalization: "While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level."

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[1] The heart of the Texas system is embodied in an intricate series of statutory provisions which make up Chapter 16 of the Texas Education Code, Tex. Educ. Code Ann. § 16.01 *et seq.* See also Tex. Educ. Code Ann. § 15.01 *et seq.,* and § 20.10 *et seq.*

[2] The figures discussed are from Plaintiffs' Exhibits 7, 8, and 12. The figures are from the 1967–1968 school year. Because the various exhibits relied upon different attendance totals, the per-pupil results do not precisely correspond to the gross figures quoted. The disparity between districts, rather than the actual figures, is the important factor.

I cannot disagree with the proposition that local control and local decisionmaking play an important part in our democratic system of government. Cf. *James* v. *Valtierra,* 402 U. S. 137 (1971). Much may be left to local option, and this case would be quite different if it were true that the Texas system, while insuring minimum educational expenditures in every district through state funding, extended a meaningful option to all local districts to increase their per-pupil expenditures and so to improve their children's education to the extent that increased funding would achieve that goal. The system would then arguably provide a rational and sensible method of achieving the stated aim of preserving an area for local initiative and decision.

The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax. In these districts, the Texas system utterly fails to extend a realistic choice to parents because the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable. That this is the situation may be readily demonstrated.

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[3] Brief for Appellants 11-13, 35.

Local school districts in Texas raise their portion of the Foundation School Program—the Local Fund Assignment—by levying ad valorem taxes on the property located within their boundaries. In addition, the districts are authorized, by the state constitution and by statute, to levy ad valorem property taxes in order to raise revenues to support educational spending over and above the expenditure of Foundation School Program funds.

Both the Edgewood and Alamo Heights districts are located in Bexar County, Texas. Student enrollment in Alamo Heights is 5,432, in Edgewood 22,862. The per-pupil market value of the taxable property in Alamo Heights is $49,078, in Edgewood $5,960. In a typical, relevant year, Alamo Heights had a maintenance tax rate of $1.20 and a debt service (bond) tax rate of 20¢ per $100 assessed evaluation, while Edgewood had a maintenance rate of 52¢ and a bond rate of 67¢. These rates, when applied to the respective tax bases, yielded Alamo Heights $1,433,473 in maintenance dollars and $236,074 in bond dollars, and Edgewood $223,034 in maintenance dollars and $279,023 in bond dollars. As is readily apparent, because of the variance in tax bases between the districts, results, in terms of revenues, do not correlate with effort, in terms of tax rate. Thus, Alamo Heights, with a tax base approximately twice the size of Edgewood's base, realized approximately six times as many maintenance dollars as Edgewood by using a tax rate only approximately two and one-half times larger. Similarly, Alamo Heights realized slightly fewer bond dollars by using a bond tax rate less than one-third of that used by Edgewood.

Nor is Edgewood's revenue-raising potential only deficient when compared with Alamo Heights. North East District has taxable property with a per-pupil market value of approximately $31,000, but total taxable property approximately four and one-half times that of Edgewood. Applying a maintenance rate of $1, North East yielded $2,818,148. Thus, because of its superior tax base, North East was able to apply a tax rate slightly less than twice that applied by Edgewood and yield more than 10 times the maintenance dollars. Similarly, North East, with a bond rate of 45¢, yielded $1,249,159—more than four times Edgewood's yield with two-thirds the rate.

Plainly, were Alamo Heights or North East to apply the Edgewood tax rate to its tax base, it would yield far greater revenues than Edgewood is able to yield applying those same rates to its base. Conversely, were Edgewood to apply the Alamo Heights or North East rates to its base, the yield would be far smaller than the Alamo Heights or North East yields. The disparity is, therefore, currently operative and its impact on Edgewood is undeniably serious. It is evident from statistics in the record that show that, applying an equalized tax rate of 85¢ per $100 assessed valuation, Alamo Heights was able to provide approximately $330 per pupil in local revenues over and above the Local Fund Assignment. In Edgewood, on the other hand, with an equalized tax rate of $1.05 per $100 of assessed valuation, $26 per pupil was raised beyond the Local Fund Assignment.[4] As previously noted, in Alamo Heights, total per-pupil revenues from local, state, and federal funds was $594 per pupil, in Edgewood $356.[5]

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[4] Variable assessment practices are also revealed in this record. Appellants do not, however, contend that this factor accounts, even to a small extent, for the interdistrict disparities.

In order to equal the highest yield in any other Bexar County district, Alamo Heights would be required to tax at the rate of 68¢ per $100 of assessed valuation. Edgewood would be required to tax at the prohibitive rate of $5.76 per $100. But state law places a $1.50 per $100 ceiling on the maintenance tax rate, a limit that would surely be reached long before Edgewood attained an equal yield. Edgewood is thus precluded in law, as well as in fact, from achieving a yield even close to that of some other districts.

The Equal Protection Clause permits discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved. As the Court stated just last Term in *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 172 (1972):

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey* v. *Doud,* 354 U. S. 457 (1957); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955); *Gulf, Colorado & Santa Fé R. Co.* v. *Ellis,* 165 U. S. 150 (1897); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886)."

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[5] The per-pupil funds received from state, federal, and other sources, while not precisely equal, do not account for the large differential and are not directly attacked in the present case.

Neither Texas nor the majority heeds this rule. If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.[6] In my view, the parents and children in Edgewood, and in like districts, suffer from an invidious discrimination violative of the Equal Protection Clause.

This does not, of course, mean that local control may not be a legitimate goal of a school-financing system. Nor does it mean that the State must guarantee each district an equal per-pupil revenue from the state school-financing system. Nor does it mean, as the majority appears to believe, that, by affirming the decision below, this Court would be "imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." On the contrary, it would merely mean that the State must fashion a financing scheme which provides a rational basis for the maximization of local control, if local control is to remain a goal of the system, and not a scheme with "different treatment be[ing] accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed* v. *Reed,* 404 U. S. 71, 75–76 (1971).

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[6] The State of Texas appears to concede that the choice of whether or not to go beyond the state-provided minimum "is easier for some districts than for others. Those districts with large amounts of taxable property can produce more revenue at a lower tax rate and will provide their children with a more expensive education." Brief for Appellants 35. The State nevertheless insists that districts have a choice and that the people in each district have exercised that choice by providing some real property tax money over and above the minimum funds guaranteed by the State. Like the majority, however, the State fails to explain why the Equal Protection Clause is not violated, or how its goal of providing local government with realistic choices as to how much money should be expended on education is implemented, where the system makes it much more difficult for some than for others to provide additional educational funds and where, as a practical and legal matter, it is impossible for some districts to provide the educational budgets that other districts can make available from real property tax revenues.

Perhaps the majority believes that the major disparity in revenues provided and permitted by the Texas system is inconsequential. I cannot agree, however, that the difference of the magnitude appearing in this case can sensibly be ignored, particularly since the State itself considers it so important to provide opportunities to exceed the minimum state educational expenditures.

There is no difficulty in identifying the class that is subject to the alleged discrimination and that is entitled to the benefits of the Equal Protection Clause. I need go no farther than the parents and children in the Edgewood district, who are plaintiffs here and who assert that they are entitled to the same choice as Alamo Heights to augment local expenditures for schools but are denied that choice by state law. This group constitutes a class sufficiently definite to invoke the protection of the Constitution. They are as entitled to the protection of the Equal Protection Clause as were the voters in allegedly underrepresented counties in the reapportionment cases. See, *e. g., Baker* v. *Carr,* 369 U. S. 186, 204–208 (1962); *Gray* v. *Sanders,* 372 U. S. 368, 375 (1963); *Reynolds* v. *Sims,* 377 U. S. 533, 554–556 (1964). And in *Bullock* v. *Carter,* 405 U. S. 134 (1972), where a challenge to the

Texas candidate filing fee on equal protection grounds was upheld, we noted that the victims of alleged discrimination wrought by the filing fee "cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause," but concluded that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.*, at 144. Similarly, in the present case we would blink reality to ignore the fact that school districts, and students in the end, are differentially affected by the Texas school-financing scheme with respect to their capability to supplement the Minimum Foundation School Program. At the very least, the law discriminates against those children and their parents who live in districts where the per-pupil tax base is sufficiently low to make impossible the provision of comparable school revenues by resort to the real property tax which is the only device the State extends for this purpose.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth.[1] More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

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[1] See *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (Minn. 1971); *Milliken* v. *Green*, 389 Mich. 1, 203 N. W. 2d 457 (1972), rehearing granted, Jan. 1973; *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P. 2d 1241 (1971); *Robinson* v. *Cahill*, 118 N. J. Super. 223, 287 A. 2d 187, 119

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination.[2] I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts

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N. J. Super. 40, 289 A. 2d 569 (1972); *Hollins* v. *Shofstall,* Civil No. C-253652 (Super. Ct. Maricopa County, Ariz., July 7, 1972). See also *Sweetwater County Planning Com. for the Organization of School Districts* v. *Hinkle,* 491 P. 2d 1234 (Wyo. 1971), juris. relinquished, 493 P. 2d 1050 (Wyo. 1972).

[2] The District Court in this case postponed decision for some two years in the hope that the Texas Legislature would remedy the gross disparities in treatment inherent in the Texas financing scheme. It was only after the legislature failed to act in its 1971 Regular Session that the District Court, apparently recognizing the lack of hope for self-initiated legislative reform, rendered its decision. See Texas Research League, Public School Finance Problems in Texas 13 (Interim Report 1972). The strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing. See N. Y. Times, Dec. 19, 1972, p. 1, col. 1.

and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education,* 347 U. S. 483, 494 (1954). I must therefore respectfully dissent.

I

The Court acknowledges that "substantial interdistrict disparities in school expenditures" exist in Texas, *ante,* at 15, and that these disparities are "largely attributable to differences in the amounts of money collected through local property taxation," *ante,* at 16. But instead of closely examining the seriousness of these disparities and the invidiousness of the Texas financing scheme, the Court undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. Yet, however praiseworthy Texas' equalizing efforts, the issue in this case is not whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme but, rather, whether the scheme itself is in fact unconstitutionally discriminatory in the face of the Fourteenth Amendment's guarantee of equal protection of the laws. When the Texas financing scheme is taken as a whole, I do not think it can be doubted that it produces a discriminatory impact on substantial numbers of the school-age children of the State of Texas.

A

Funds to support public education in Texas are derived from three sources: local ad valorem property taxes; the Federal Government; and the state government.[3] It is enlightening to consider these in order.

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[3] Texas provides its school districts with extensive bonding authority to obtain capital both for the acquisition of school sites and "the construction and equipment of school buildings," Tex. Educ. Code Ann. § 20.01 (1972), and for the acquisition, construction, and

Under Texas law, the only mechanism provided the local school district for raising new, unencumbered revenues is the power to tax property located within its boundaries.[4] At the same time, the Texas financing scheme effectively restricts the use of monies raised by local property taxation to the support of public education within the boundaries of the district in which they are raised, since any such taxes must be approved by a majority of the property-taxpaying voters of the district.[5]

The significance of the local property tax element of the Texas financing scheme is apparent from the fact that it provides the funds to meet some 40% of the cost of public education for Texas as a whole.[6] Yet the amount of revenue that any particular Texas district can raise is dependent on two factors—its tax rate and its amount of taxable property. The first factor is determined by the property-taxpaying voters of the district.[7] But, regardless of the enthusiasm of the local voters for public

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maintenance of "gymnasia, stadia, or other recreational facilities," *id.*, §§ 20.21–20.22. While such private capital provides a fourth source of revenue, it is, of course, only temporary in nature since the principal and interest of all bonds must ultimately be paid out of the receipts of the local ad valorem property tax, see *id.*, §§ 20.01, 20.04, except to the extent that outside revenues derived from the operation of certain facilities, such as gymnasia, are employed to repay the bonds issued thereon, see *id.*, §§ 20.22, 20.25.

[4] See Tex. Const., Art. 7, § 3; Tex. Educ. Code Ann. §§ 20.01–20.02. As a part of the property tax scheme, bonding authority is conferred upon the local school districts, see n. 3, *supra*.

[5] See Tex. Educ. Code Ann. § 20.04.

[6] For the 1970–1971 school year, the precise figure was 41.1%. See Texas Research League, *supra*, n. 2, at 9.

[7] See Tex. Educ. Code Ann. § 20.04.

Theoretically, Texas law limits the tax rate for public school maintenance, see *id.*, § 20.02, to $1.50 per $100 valuation, see *id.*, § 20.04 (d). However, it does not appear that any Texas district presently taxes itself at the highest rate allowable, although some poor districts are approaching it, see App. 174.

education, the second factor—the taxable property wealth of the district—necessarily restricts the district's ability to raise funds to support public education.[8] Thus, even though the voters of two Texas districts may be willing to make the same tax effort, the results for the districts will be substantially different if one is property rich while the other is property poor. The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.

The seriously disparate consequences of the Texas local property tax, when that tax is considered alone, are amply illustrated by data presented to the District Court by appellees. These data included a detailed study of a sample of 110 Texas school districts[9] for the 1967-1968 school year conducted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. Among other things, this study revealed that the 10 richest districts examined, each of which had more than $100,000 in taxable property per pupil, raised through local effort an average of $610 per pupil, whereas the four poorest districts studied, each of which had less than $10,000 in taxable property per pupil, were able to raise only an average of $63 per pupil.[10] And, as the Court effectively recognizes, *ante,* at 27, this correlation between the amount of taxable property per pupil and the amount of local revenues per pupil holds true for the 96 districts in between the richest and poorest districts.[11]

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[8] Under Texas law local districts are allowed to employ differing bases of assessment—a fact that introduces a third variable into the local funding. See Tex. Educ. Code Ann. § 20.03. But neither party has suggested that this factor is responsible for the disparities in revenues available to the various districts. Consequently, I believe we must deal with this case on the assumption that differences in local methods of assessment do not meaningfully affect the revenue-raising power of local districts relative to one another. The Court apparently admits as much. See *ante*, at 46. It should be noted, moreover, that the main set of data introduced before the District Court to establish the disparities at issue here was based upon "equalized taxable property" values which had been adjusted to correct for differing methods of assessment. See App. C to Affidavit of Professor Joel S. Berke.

[9] Texas has approximately 1,200 school districts.

It is clear, moreover, that the disparity of per-pupil revenues cannot be dismissed as the result of lack of local effort—that is, lower tax rates—by property-poor districts. To the contrary, the data presented below indicate that the poorest districts tend to have the highest tax rates and the richest districts tend to have the lowest tax rates.[12] Yet, despite the apparent *extra* effort being made by the poorest districts, they are unable even to begin to match the richest districts in terms of the production of local revenues. For example, the 10 richest districts studied by Professor Berke were able to produce $585 per pupil with an equalized tax rate of 31¢

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[10] See Appendix I, *post,* p. 134.

[11] See *ibid.* Indeed, appellants acknowledge that the relevant data from Professor Berke's affidavit show "a very positive correlation, 0.973, between market value of taxable property per pupil and state and local revenues per pupil." Reply Brief for Appellants 6 n. 9.

While the Court takes issue with much of Professor Berke's data and conclusions, *ante,* at 15–16, n. 38, and 25–27, I do not understand its criticism to run to the basic finding of a correlation between taxable district property per pupil and local revenues per pupil. The critique of Professor Berke's methodology upon which the Court relies, see Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano* v. *Priest* and its Progeny, 120 U. Pa. L. Rev. 504, 523–525, nn. 67, 71 (1972), is directed only at the suggested correlations between family income and taxable district wealth and between race and taxable district wealth. Obviously, the appellants do not question the relationship in Texas between taxable district wealth and per-pupil expenditures; and there is no basis for the Court to do so, whatever the criticisms that may be leveled at other aspects of Professor Berke's study, see *infra,* n. 56.

[12] See Appendix II, *post,* p. 135.

on $100 of equalized valuation, but the four poorest districts studied, with an equalized rate of 70¢ on $100 of equalized valuation, were able to produce only $60 per pupil.[13] Without more, this state-imposed system of educational funding presents a serious picture of widely varying treatment of Texas school districts, and thereby of Texas schoolchildren, in terms of the amount of funds available for public education.

Nor are these funding variations corrected by the other aspects of the Texas financing scheme. The Federal Government provides funds sufficient to cover only some 10% of the total cost of public education in Texas.[14] Furthermore, while these federal funds are not distributed in Texas solely on a per-pupil basis, appellants do not here contend that they are used in such a way as to ameliorate significantly the widely varying consequences for Texas school districts and schoolchildren of the local property tax element of the state financing scheme.[15]

State funds provide the remaining some 50% of the monies spent on public education in Texas.[16] Technically, they are distributed under two programs. The first is the Available School Fund, for which provision is made in the Texas Constitution.[17] The Available

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[13] See *ibid.*

[14] For the 1970–1971 school year, the precise figure was 10.9%. See Texas Research League, *supra*, n. 2, at 9.

[15] Appellants made such a contention before the District Court but apparently have abandoned it in this Court. Indeed, data introduced in the District Court simply belie the argument that federal funds have a significant equalizing effect. See Appendix I, *post*, p. 134. And, as the District Court observed, it does not follow that remedial action by the Federal Government would excuse any unconstitutional discrimination effected by the state financing scheme. 337 F. Supp. 280, 284.

[16] For the 1970–1971 school year, the precise figure was 48%. See Texas Research League, *supra*, n. 2, at 9.

[17] See Tex. Const., Art. 7, § 5 (Supp. 1972). See also Tex. Educ. Code Ann. § 15.01 (b).

School Fund is composed of revenues obtained from a number of sources, including receipts from the state ad valorem property tax, one-fourth of all monies collected by the occupation tax, annual contributions by the legislature from general revenues, and the revenues derived from the Permanent School Fund.[18] For the 1970-1971 school year the Available School Fund contained $296,000,000. The Texas Constitution requires that this money be distributed annually on a per capita basis [19] to the local school districts. Obviously, such a flat grant could not alone eradicate the funding differentials attributable to the local property tax. Moreover, today the Available School Fund is in reality simply one facet of the second state financing program, the Minimum Foundation School Program,[20] since each district's annual share of the Fund is deducted from the sum to which the district is entitled under the Foundation Program.[21]

The Minimum Foundation School Program provides funds for three specific purposes: professional salaries, current operating expenses, and transportation expenses.[22] The State pays, on an overall basis, for approximately 80% of the cost of the Program; the remaining 20% is distributed among the local school districts under the

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[18] See Tex. Educ. Code Ann. § 15.01 (b).

The Permanent School Fund is, in essence, a public trust initially endowed with vast quantities of public land, the sale of which has provided an enormous corpus that in turn produces substantial annual revenues which are devoted exclusively to public education. See Tex. Const., Art. 7, § 5 (Supp. 1972). See also 5 Report of Governor's Committee on Public School Education, The Challenge and the Chance 11 (1969) (hereinafter Governor's Committee Report).

[19] This is determined from the average daily attendance within each district for the preceding year. Tex. Educ. Code Ann. § 15.01 (c).

[20] See *id.*, §§ 16.01-16.975.

[21] See *id.*, §§ 16.71 (2), 16.79.

[22] See *id.*, §§ 16.301-16.316, 16.45, 16.51-16.63.

Local Fund Assignment.[23] Each district's share of the Local Fund Assignment is determined by a complex "economic index" which is designed to allocate a larger share of the costs to property-rich districts than to property-poor districts.[24] Each district pays its share with revenues derived from local property taxation.

The stated purpose of the Minimum Foundation School Program is to provide certain basic funding for each local Texas school district.[25] At the same time, the Program was apparently intended to improve, to some degree, the financial position of property-poor districts relative to property-rich districts, since—through the use of the economic index—an effort is made to charge a disproportionate share of the costs of the Program to rich districts.[26] It bears noting, however, that substantial criticism has been leveled at the practical effectiveness of the economic index system of local cost allocation.[27] In theory, the index is designed to ascertain the relative ability of each district to contribute to the Local Fund Assignment from local property taxes. Yet the index is not developed simply on the basis of each district's taxable wealth. It also takes into account the district's relative income from manufacturing, mining, and agriculture, its payrolls, and its scholastic population.[28]

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[23] See *id.*, §§ 16.72–16.73, 16.76–16.77.

[24] See *id.*, §§ 16.74–16.76. The formula for calculating each district's share is described in 5 Governor's Committee Report 44–48.

[25] See Tex. Educ. Code Ann. § 16.01.

[26] See 5 Governor's Committee Report 40–41.

[27] See *id.*, at 45–67; Texas Research League, Texas Public Schools Under the Minimum Foundation Program—An Evaluation: 1949–1954, pp. 67–68 (1954).

[28] Technically, the economic index involves a two-step calculation. First, on the basis of the factors mentioned above, each Texas county's share of the Local Fund Assignment is determined. Then each county's share is divided among its school districts on the basis of their relative shares of the county's assessable wealth. See

It is difficult to discern precisely how these latter factors are predictive of a district's relative ability to raise revenues through local property taxes. Thus, in 1966, one of the consultants who originally participated in the development of the Texas economic index adopted in 1949 told the Governor's Committee on Public School Education: "The Economic Index approach to evaluating local ability offers a little better measure than sheer chance, but not much." [29]

Moreover, even putting aside these criticisms of the economic index as a device for achieving meaningful district wealth equalization through cost allocation, poor districts still do not necessarily *receive* more state aid than property-rich districts. For the standards which currently determine the amount received from the Foundation School Program by any particular district [30] favor property-rich districts.[31] Thus, focusing on the same

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Tex. Educ. Code Ann. §§ 16.74–16.76; 5 Governor's Committee Report 43–44; Texas Research League, Texas Public School Finance: A Majority of Exceptions 6–8 (2d Interim Report 1972).

[29] 5 Governor's Committee Report 48, quoting statement of Dr. Edgar Morphet.

[30] The extraordinarily complex standards are summarized in 5 Governor's Committee Report 41–43.

[31] The key element of the Minimum Foundation School Program is the provision of funds for professional salaries—more particularly, for teacher salaries. The Program provides each district with funds to pay its professional payroll as determined by certain state standards. See Tex. Educ. Code Ann. §§ 16.301–16.316. If the district fails to pay its teachers at the levels determined by the state standards it receives nothing from the Program. See *id.,* § 16.301 (c). At the same time, districts are free to pay their teachers salaries in excess of the level set by the state standards, using local revenues—that is, property tax revenue—to make up the difference, see *id.,* § 16.301 (a).

The state salary standards focus upon two factors: the educational level and the experience of the district's teachers. See *id.,* §§ 16.301–16.316. The higher these two factors are, the more funds the dis-

Edgewood Independent and Alamo Heights School Districts which the majority uses for purposes of illustration, we find that in 1967–1968 property-rich Alamo Heights,[32] which raised $333 per pupil on an equalized tax rate of 85¢ per $100 valuation, received $225 per pupil from the Foundation School Program, while property-poor Edgewood,[33] which raised only $26 per pupil with an equalized tax rate of $1.05 per $100 valuation, received only $222 per pupil from the Foundation School Program.[34] And, more recent data, which indicate that for the 1970–1971 school year Alamo Heights received $491 per pupil from

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trict will receive from the Foundation Program for professional salaries.

It should be apparent that the net effect of this scheme is to provide more assistance to property-rich districts than to property-poor ones. For rich districts are able to pay their teachers, out of local funds, salary increments above the state minimum levels. Thus, the rich districts are able to attract the teachers with the best education and the most experience. To complete the circle, this then means, given the state standards, that the rich districts receive more from the Foundation Program for professional salaries than do poor districts. A portion of Professor Berke's study vividly illustrates the impact of the State's standards on districts of varying wealth. See Appendix III, *post*, p. 136.

[32] In 1967–1968, Alamo Heights School District had $49,478 in taxable property per pupil. See Berke Affidavit, Table VII, App. 216.

[33] In 1967–1968, Edgewood Independent School District had $5.960 in taxable property per pupil. *Ibid.*

[34] I fail to understand the relevance for this case of the Court's suggestion that if Alamo Heights School District, which is approximately the same physical size as Edgewood Independent School District but which has only one-fourth as many students, had the same number of students as Edgewood, the former's per-pupil expenditure would be considerably closer to the latter's. *Ante,* at 13 n. 33. Obviously, this is true, but it does not alter the simple fact that Edgewood *does* have four times as many students but not four times as much taxable property wealth. From the perspective of Edgewood's school children then—the perspective that ultimately counts here—Edgewood is clearly a much poorer district than Alamo

the Program while Edgewood received only $356 per pupil, hardly suggest that the wealth gap between the districts is being narrowed by the State Program. To the contrary, whereas in 1967–1968 Alamo Heights received only $3 per pupil, or about 1%, more than Edgewood in state aid, by 1970–1971 the gap had widened to a difference of $135 per pupil, or about 38%.[35] It was data of this character that prompted the District Court to observe that "the current [state aid] system tends to subsidize the rich at the expense of the poor, rather than the other way around." [36] 337 F. Supp. 280, 282. And even the appellants go no further here than to venture that the Minimum Foundation School Program has "a mildly equalizing effect." [37]

Despite these facts, the majority continually emphasizes how much state aid has, in recent years, been given

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Heights. The question here is not whether districts have equal taxable property wealth in absolute terms, but whether districts have differing taxable wealth given their respective school-age populations.

[35] In the face of these gross disparities in treatment which experience with the Texas financing scheme has revealed, I cannot accept the Court's suggestion that we are dealing here with a remedial scheme to which we should accord substantial deference because of its accomplishments rather than criticize it for its failures. *Ante,* at 38–39. Moreover, Texas' financing scheme is hardly remedial legislation of the type for which we have previously shown substantial tolerance. Such legislation may in fact extend the vote to "persons who otherwise would be denied it by state law," *Katzenbach* v. *Morgan,* 384 U. S. 641, 657 (1966), or it may eliminate the evils of the private bail bondsman, *Schilb* v. *Kuebel,* 404 U. S. 357 (1971). But those are instances in which a legislative body has sought to remedy problems for which it cannot be said to have been directly responsible. By contrast, public education is the function of the State in Texas, and the responsibility for any defect in the financing scheme must ultimately rest with the State. It is the State's own scheme which has caused the funding problem, and, thus viewed, that scheme can hardly be deemed remedial.

[36] Cf. Appendix I, *post,* p. 134.

[37] Brief for Appellants 3.

to property-poor Texas school districts. What the Court fails to emphasize is the cruel irony of how much more state aid is being given to property-rich Texas school districts on top of their already substantial local property tax revenues.[38] Under any view, then, it is apparent that the state aid provided by the Foundation School Program fails to compensate for the large funding variations attributable to the local property tax element of the Texas financing scheme. And it is these stark differences in the treatment of Texas school districts and school children inherent in the Texas financing scheme, not the absolute amount of state aid provided to any particular school district, that are the crux of this case. There can, moreover, be no escaping the conclusion that the local property tax which is dependent upon taxable district property wealth is an essential feature of the Texas scheme for financing public education.[39]

B

The appellants do not deny the disparities in educational funding caused by variations in taxable district property wealth. They do contend, however, that whatever the differences in per-pupil spending among Texas districts, there are no discriminatory consequences for the children of the disadvantaged districts. They recognize that what is at stake in this case is the quality of the public education provided Texas children in the districts in which they live. But appellants reject the suggestion that the quality of education in any particular district is determined by money—beyond some minimal level of funding which they believe to be assured every Texas district by the Minimum Foundation School Program. In their view, there is simply no denial of equal educational opportunity to any Texas schoolchildren as a result of the widely varying per-pupil spending power provided districts under the current financing scheme.

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[38] Thus, in 1967–1968, Edgewood had a total of $248 per pupil in state and local funds compared with a total of $558 per pupil for Alamo Heights. See Berke Affidavit, Table X, App. 219. For 1970–1971, the respective totals were $418 and $913. See Texas Research League, *supra*, n. 2, at 14.

[39] Not only does the local property tax provide approximately 40% of the funds expended on public education, but it is the *only* source of funds for such essential aspects of educational financing as the payment of school bonds, see n. 3, *supra*, and the payment of the district's share of the Local Fund Assignment, as well as for nearly all expenditures above the minimums established by the Foundation School Program.

In my view, though, even an unadorned restatement of this contention is sufficient to reveal its absurdity. Authorities concerned with educational quality no doubt disagree as to the significance of variations in per-pupil spending.[40] Indeed, conflicting expert testimony was presented to the District Court in this case concerning the effect of spending variations on educational achievement.[41] We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter. In this regard, I believe the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds—and thus with greater choice in educational planning—may nevertheless excel is to the credit of the child, not the State, cf. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 349 (1938). Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

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[40] Compare, *e. g.*, J. Coleman et al., Equality of Educational Opportunity 290–330 (1966); Jencks, The Coleman Report and the Conventional Wisdom, in On Equality of Educational Opportunity 69, 91–104 (F. Mosteller & D. Moynihan eds. 1972), with, *e. g.*, J. Guthrie, G. Kleindorfer, H. Levin, & R. Stout, Schools and Inequality 79–90 (1971); Kiesling, Measuring a Local Government Service: A Study of School Districts in New York State, 49 Rev. Econ. & Statistics 356 (1967).

[41] Compare Berke Answers to Interrogatories 10 ("Dollar expenditures are probably the best way of measuring the quality of education afforded students . . ."), with Graham Deposition 39 ("[I]t is not just necessarily the money, no. It is how wisely you spend it"). It warrants noting that even appellants' witness, Mr. Graham, qualified the importance of money only by the requirement of wise expenditure. Quite obviously, a district which is property poor is powerless to match the education provided by a property-rich district, assuming each district allocates its funds with equal wisdom.

Hence, even before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause. As a basis for striking down state-enforced segregation of a law school, the Court in *Sweatt* v. *Painter,* 339 U. S. 629, 633–634 (1950), stated:

> "[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [whites-only] Law School is superior. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close."

See also *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U. S. 637 (1950). Likewise, it is difficult to believe that if the children of Texas had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers, and a less diversified curriculum. In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.[42]

The consequences, in terms of objective educational input, of the variations in district funding caused by the Texas financing scheme are apparent from the data introduced before the District Court. For example, in 1968–1969, 100% of the teachers in the property-rich Alamo Heights School District had college degrees.[43] By contrast, during the same school year only 80.02% of the teachers had college degrees in the property poor Edgewood Independent School District.[44] Also, in 1968–1969, approximately 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits.[45] This is undoubtedly a reflection of the fact that the top of Edgewood's teacher salary scale was approximately 80% of Alamo Heights'.[46] And, not surprisingly, the teacher-student ratio varies significantly between the two districts.[47] In other words, as might be expected, a difference in the funds available to districts results in a difference in educational inputs available for a child's public education in Texas. For constitutional purposes, I believe this situation, which is directly attributable to the Texas financing scheme, raises a grave question of state-created discrimination in the provision of public education. Cf. *Gaston County* v. *United States*, 395 U. S. 285, 293-294 (1969).

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[42] See Brief of *amici curiae, inter alia,* San Marino Unified School District; Beverly Hills Unified School District; Brief of *amici curiae, inter alia,* Bloomfield Hills, Michigan, School District; Dearborn City, Michigan, School District; Grosse Pointe, Michigan, Public School System.

[43] Answers to Plaintiffs' Interrogatories, App. 115.

[44] *Ibid.* Moreover, during the same period, 37.17% of the teachers in Alamo Heights had advanced degrees, while only 14.98% of Edgewood's faculty had such degrees. See *id.,* at 116.

[45] *Id.,* at 117.

At the very least, in view of the substantial interdistrict disparities in funding and in resulting educational inputs shown by appellees to exist under the Texas financing scheme, the burden of proving that these disparities do not in fact affect the quality of children's education must fall upon the appellants. Cf. *Hobson* v. *Hansen*, 327 F. Supp. 844, 860-861 (DC 1971). Yet appellants made no effort in the District Court to demonstrate that educational quality is not affected by variations in funding and in resulting inputs. And, in this Court, they have argued no more than that the relationship is ambiguous. This is hardly sufficient to overcome appellees' prima facie showing of state-created discrimination between the schoolchildren of Texas with respect to objective educational opportunity.

Nor can I accept the appellants' apparent suggestion that the Texas Minimum Foundation School Program effectively eradicates any discriminatory effects otherwise resulting from the local property tax element of the

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[46] *Id.*, at 118.

[47] In the 1967-1968 school year, Edgewood had 22,862 students and 864 teachers, a ratio of 26.5 to 1. See *id.*, at 110, 114. In Alamo Heights, for the same school year, there were 5,432 students and 265 teachers for a ratio of 20.5 to 1. *Ibid.*

Texas financing scheme. Appellants assert that, despite its imperfections, the Program "does guarantee an adequate education to every child." [48] The majority, in considering the constitutionality of the Texas financing scheme, seems to find substantial merit in this contention, for it tells us that the Foundation Program "was designed to provide an adequate minimum educational offering in every school in the State," *ante,* at 45, and that the Program "assur[es] a basic education for every child," *ante,* at 49. But I fail to understand how the constitutional problems inherent in the financing scheme are eased by the Foundation Program. Indeed, the precise thrust of the appellants' and the Court's remarks are not altogether clear to me.

The suggestion may be that the state aid received via the Foundation Program sufficiently improves the position of property-poor districts *vis-à-vis* property-rich districts—in terms of educational funds—to eliminate any claim of interdistrict discrimination in available educational resources which might otherwise exist if educational funding were dependent solely upon local property taxation. Certainly the Court has recognized that to demand precise equality of treatment is normally unrealistic, and thus minor differences inherent in any practical context usually will not make out a substantial equal protection claim. See, *e. g., Mayer* v. *City of Chicago,* 404 U. S. 189, 194–195 (1971); *Draper* v. *Washington,* 372 U. S. 487, 495–496 (1963); *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 501 (1931). But, as has already been seen, we are hardly presented here with some *de minimis* claim of discrimination resulting from the play necessary in any functioning system; to the contrary, it is clear that the Foundation Program utterly fails to ameliorate the seriously discriminatory effects of the local property tax.[49]

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[48] Reply Brief for Appellants 17. See also, *id.,* at 5, 15–16.

Alternatively, the appellants and the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education which evidently is "enough." [50] The basis for such a novel view is far from clear. It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. As Mr. Justice Frankfurter explained:

> "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. . . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas,* 310 U. S. 141, 147 (1940).

See also *Douglas* v. *California,* 372 U. S. 353, 357 (1963); *Goesaert* v. *Cleary,* 335 U. S. 464, 466 (1948).

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[49] Indeed, even apart from the differential treatment inherent in the local property tax, the significant interdistrict disparities in state aid received under the Minimum Foundation School Program would seem to raise substantial equal protection questions.

[50] I find particularly strong intimations of such a view in the majority's efforts to denigrate the constitutional significance of children in property-poor districts "receiving a poorer quality education than that available to children in districts having more assessable wealth" with the assertion "that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Ante,* at 23, 24. The Court, to be sure, restricts its remark to "wealth" discrimination. But the logical basis for such a restriction is not explained by the Court, nor is it otherwise apparent, see *infra,* at 117-120 and n. 77.

But this Court has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920).

Even if the Equal Protection Clause encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly seem to be a poor candidate for its application. Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is "enough" to excuse constitutional discrimination. One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient. Indeed, the majority's apparent reliance upon the adequacy of the educational opportunity assured by the Texas Minimum Foundation School Program seems fundamentally inconsistent with its own recognition that educational authorities are unable to agree upon what makes for educational quality, see *ante,* at 42–43 and n. 86 and at 47 n. 101. If, as the majority stresses, such authorities are uncertain as to the impact of various levels of funding on educational quality, I fail to see where it finds the expertise to divine that the particular levels of funding provided by the Program assure an adequate educational opportunity—much less an education substantially equivalent in quality to that which a higher level of funding might provide. Certainly appellants' mere assertion before this Court of the adequacy of the education guaranteed by the Minimum Foundation School Program cannot obscure the constitutional implications of the discrimination in educational funding and objective educational inputs resulting from the local property tax—particularly since the appellees offered substantial uncontroverted evidence before the District Court impugning the now much-touted "adequacy" of the education guaranteed by the Foundation Program.[51]

In my view, then, it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle. Here, appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the schoolchildren of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause.[52]

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[51] See Answers to Interrogatories by Dr. Joel S. Berke, Ans. 17, p. 9; Ans. 48–51, pp. 22–24; Ans. 88–89, pp. 41–42; Deposition of Dr. Daniel C. Morgan, Jr., at 52–55; Affidavit of Dr. Daniel C. Morgan, Jr., App. 242–243.

[52] It is true that in two previous cases this Court has summarily affirmed district court dismissals of constitutional attacks upon other state educational financing schemes. See *McInnis* v. *Shapiro,* 293 F. Supp. 327 (ND Ill. 1968), aff'd *per curiam, sub nom. McInnis* v. *Ogilvie,* 394 U. S. 322 (1969); *Burruss* v. *Wilkerson,* 310 F. Supp. 572 (WD Va. 1969), aff'd *per curiam,* 397 U. S. 44 (1970). But those decisions cannot be considered dispositive of this action, for the thrust of those suits differed materially from that of the present case. In *McInnis,* the plaintiffs asserted that "*only* a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment." 293 F. Supp., at 331. The District Court concluded that "(1) the Fourteenth Amendment does not require that public school

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Despite the evident discriminatory effect of the Texas financing scheme, both the appellants and the majority raise substantial questions concerning the precise character of the disadvantaged class in this case. The District Court concluded that the Texas financing scheme draws "distinction between groups of citizens depending upon the wealth of the district in which they live" and thus creates a disadvantaged class composed of persons living in property-poor districts. See 337 F. Supp., at 282. See also *id.*, at 281. In light of the data introduced before the District Court, the conclusion that the schoolchildren of property-poor districts constitute a sufficient class for our purposes seems indisputable to me.

Appellants contend, however, that in constitutional terms this case involves nothing more than discrimination against local school districts, not against individuals, since on its face the state scheme is concerned only with the provision of funds to local districts. The result of the Texas financing scheme, appellants suggest, is merely that some local districts have more available revenues for education; others have less. In that re-

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expenditures be made only on the basis of pupils' educational needs, and (2) the lack of judicially manageable standards makes this controversy nonjusticiable." *Id.*, at 329. The *Burruss* District Court dismissed that suit essentially in reliance on *McInnis* which it found to be "scarcely distinguishable." 310 F. Supp., at 574. This suit involves no effort to obtain an allocation of school funds that considers only educational need. The District Court ruled only that the State must remedy the discrimination resulting from the distribution of taxable local district wealth which has heretofore prevented many districts from truly exercising local fiscal control. Furthermore, the limited holding of the District Court presents none of the problems of judicial management which would exist if the federal courts were to attempt to ensure the distribution of educational funds solely on the basis of educational need, see *infra*, at 130–132.

spect, they point out, the States have broad discretion in drawing reasonable distinctions between their political subdivisions. See *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218, 231 (1964); *McGowan* v. *Maryland,* 366 U. S. 420, 427 (1961); *Salsburg* v. *Maryland,* 346 U. S. 545, 550–554 (1954).

But this Court has consistently recognized that where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location. See *Gordon* v. *Lance,* 403 U. S. 1, 4 (1971); *Reynolds* v. *Sims,* 377 U. S. 533, 565–566 (1964); *Gray* v. *Sanders* 372 U. S. 368, 379 (1963). Texas has chosen to provide free public education for all its citizens, and it has embodied that decision in its constitution.[53] Yet, having established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas' financing scheme, has provided some Texas schoolchildren with substantially less resources for their education than others. Thus, while on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live. Consequently, the District Court correctly concluded that the Texas financing scheme discriminates, from a constitutional perspective, between schoolchildren on the basis of the amount of taxable property located within their local districts.

In my Brother STEWART's view, however, such a description of the discrimination inherent in this case is apparently not sufficient, for it fails to define the "kind of objectively identifiable classes" that he evidently perceives to be necessary for a claim to be "cognizable under the Equal Protection Clause," *ante,* at 62. He asserts that this is also the view of the majority, but he is unable to cite, nor have I been able to find, any portion of the Court's opinion which remotely suggests that there is no objectively identifiable or definable class in this case. In any event, if he means to suggest that an essential predicate to equal protection analysis is the precise identification of the particular individuals who compose the disadvantaged class, I fail to find the source from which he derives such a requirement. Certainly such precision is not analytically necessary. So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination—whatever the standard of equal protection analysis employed.[54] This is clear from our decision only last Term in *Bullock* v. *Carter,* 405 U. S. 134 (1972), where the Court, in striking down Texas' primary filing fees as violative of equal protection, found no impediment to equal protection analysis in the fact that the members of the disadvantaged class could not be readily identified. The Court recognized that the filing-fee system tended "to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor." *Id.,* at 144. The

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[53] Tex. Const., Art. 7, § 1.

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[54] Problems of remedy may be another matter. If provision of the relief sought in a particular case required identification of each member of the affected class, as in the case of monetary relief, the need for clarity in defining the class is apparent. But this involves the procedural problems inherent in class action litigation, not the character of the elements essential to equal protection analysis. We are concerned here only with the latter. Moreover, it is evident that in cases such as this, provision of appropriate relief, which takes the injunctive form, is not a serious problem since it is enough to direct the action of appropriate officials. Cf. *Potts* v. *Flax,* 313 F. 2d 284, 288–290 (CA5 1963).

Court also recognized that "[t]his disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause . . . ." *Ibid.* Nevertheless, it concluded that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status." *Ibid.* The nature of the classification in *Bullock* was clear, although the precise membership of the disadvantaged class was not. This was enough in *Bullock* for purposes of equal protection analysis. It is enough here.

It may be, though, that my Brother STEWART is not in fact demanding precise identification of the membership of the disadvantaged class for purposes of equal protection analysis, but is merely unable to discern with sufficient clarity the nature of the discrimination charged in this case. Indeed, the Court itself displays some uncertainty as to the exact nature of the discrimination and the resulting disadvantaged class alleged to exist in this case. See *ante,* at 19–20. It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue. In fact, the absence of such a clear, articulable understanding of the nature of alleged discrimination in a particular instance may well suggest the absence of any real discrimination. But such is hardly the case here.

A number of theories of discrimination have, to be sure, been considered in the course of this litigation. Thus, the District Court found that in Texas the poor and minority group members tend to live in property-poor districts, suggesting discrimination on the basis of both personal wealth and race. See 337 F. Supp., at 282 and n. 3. The Court goes to great lengths to discredit the data upon which the District Court relied, and thereby its conclusion that poor people live in property-poor districts.[55] Although I have serious doubts as to the correctness of the Court's analysis in rejecting the data submitted below,[56] I have no need to join issue on these factual disputes.

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[55] I assume the Court would lodge the same criticism against the validity of the finding of a correlation between poor districts and racial minorities.

[56] The Court rejects the District Court's finding of a correlation between poor people and poor districts with the assertion that "there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts" in Texas. *Ante*, at 23. In support of its conclusion the Court offers absolutely no data—which it cannot on this record—concerning the distribution of poor people in Texas to refute the data introduced below by appellees; it relies instead on a recent law review note concerned solely with the State of Connecticut, Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L. J. 1303 (1972). Common sense suggests that the basis for drawing a demographic conclusion with respect to a geographically large, urban-rural, industrial-agricultural State such as Texas from a geographically small, densely populated, highly industrialized State such as Connecticut is doubtful at best.

Furthermore, the article upon which the Court relies to discredit the statistical procedures employed by Professor Berke to establish the correlation between poor people and poor districts, see n. 11, *supra*, based its criticism primarily on the fact that only four of the 110 districts studied were in the lowest of the five categories, which were determined by relative taxable property per pupil, and most districts clustered in the middle three groups. See Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano* v. *Priest* and its Progeny, 120 U. Pa. L. Rev. 504, 524 n. 67 (1972). See also *ante*, at 26–27. But the Court fails to note that the four poorest districts in the sample had over 50,000 students which constituted 10% of the students in the entire sample. It appears, moreover, that even when the richest and the poorest categories are enlarged to include in each category 20% of the students in the sample, the correlation between district and individual wealth holds true. See Brief for the Governors of Minnesota, Maine, South Dakota, Wisconsin, and Michigan as *amici curiae* 17 n. 21.

Finally, it cannot be ignored that the data introduced by appellees went unchallenged in the District Court. The majority's willingness

I believe it is sufficient that the overarching form of discrimination in this case is between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live. To understand both the precise nature of this discrimination and the parameters of the disadvantaged class it is sufficient to consider the constitutional principle which appellees contend is controlling in the context of educational financing. In their complaint appellees asserted that the Constitution does not permit local district wealth to be determinative of educational opportunity.[57] This is simply another way of saying, as the District Court concluded, that consistent with the guarantee of equal protection of the laws, "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." 337 F. Supp., at 284. Under such a principle, the children of a district are excessively advantaged if that district has more taxable property per pupil than the average amount of taxable property per pupil considering the State as a whole. By contrast, the children of a district are disadvantaged if that district has less taxable property per pupil than the state average. The majority attempts to disparage such a definition of the disadvantaged class as the product of an "artificially defined level" of district wealth. *Ante*, at 28. But such is clearly not the case, for this is the

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to permit appellants to litigate the correctness of those data for the first time before this tribunal—where effective response by appellees is impossible—is both unfair and judicially unsound.

[57] Third Amended Complaint App. 23. Consistent with this theory, appellees purported to represent, among others, a class composed of "all . . . school children in independent school districts . . . who . . . have been deprived of the equal protection of the law under the Fourteenth Amendment with regard to public school education because of the low value of the property lying within the independent school districts in which they reside." *Id.*, at 15.

definition unmistakably dictated by the constitutional principle for which appellees have argued throughout the course of this litigation. And I do not believe that a clearer definition of either the disadvantaged class of Texas schoolchildren or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed.[58] Whether this discrimination, against the schoolchildren of property-poor districts, inherent in the Texas financing scheme, is violative of the Equal Protection Clause is the question to which we must now turn.

II

To avoid having the Texas financing scheme struck down because of the interdistrict variations in taxable property wealth, the District Court determined that it was insufficient for appellants to show merely that the State's scheme was rationally related to some legitimate state purpose; rather, the discrimination inherent in the scheme had to be shown necessary to promote a "compelling state interest" in order to withstand constitutional scrutiny. The basis for this determination was twofold: first, the financing scheme divides citizens on a wealth basis, a classification which the District Court viewed as highly suspect; and second, the discriminatory scheme directly affects what it considered to be a "fundamental interest," namely, education.

This Court has repeatedly held that state discrimination which either adversely affects a "fundamental interest," see, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330, 336-342 (1972); *Shapiro* v. *Thompson,* 394 U. S. 618, 629-631 (1969), or is based on a distinction of a suspect character, see, *e. g., Graham* v. *Richardson,* 403 U. S. 365, 372

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[58] The degree of judicial scrutiny that this particular classification demands is a distinct issue which I consider in Part II, C, *infra.*

(1971); *McLaughlin* v. *Florida,* 379 U. S. 184, 191–192 (1964), must be carefully scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest. See, *e. g., Dunn* v. *Blumstein, supra,* at 342–343; *Shapiro* v. *Thompson, supra,* at 634. The majority today concludes, however, that the Texas scheme is not subject to such a strict standard of review under the Equal Protection Clause. Instead, in its view, the Texas scheme must be tested by nothing more than that lenient standard of rationality which we have traditionally applied to discriminatory state action in the context of economic and commercial matters. See, *e. g., McGowan* v. *Maryland,* 366 U. S., at 425–426; *Morey* v. *Doud,* 354 U. S. 457, 465–466 (1957); *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S., at 415; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79 (1911). By so doing, the Court avoids the telling task of searching for a substantial state interest which the Texas financing scheme, with its variations in taxable district property wealth, is necessary to further. I cannot accept such an emasculation of the Equal Protection Clause in the context of this case.

A

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. See *Dandridge* v. *Williams,* 397 U. S. 471, 519–521 (1970) (dissenting opinion); *Richardson* v. *Belcher,* 404 U. S. 78, 90 (1971) (dissenting opinion). The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Dandridge* v. *Williams, supra,* at 520–521 (dissenting opinion).

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. See *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972). Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right "was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *United States* v. *Guest,* 383 U. S. 745, 758 (1966). See also *Crandall* v. *Nevada,* 6 Wall. 35, 48 (1868). Consequently, the Court has required that a state classification affecting the constitutionally protected right to travel must be "shown to be necessary to promote a *compelling* governmental interest." *Shapiro* v. *Thompson,* 394 U. S., at 634. But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal protection analysis is *always* determined by whether that interest "is a right . . . explicitly or implicitly guaranteed by the Constitution," *ante,* at 33–34.[59]

I would like to know where the Constitution guarantees the right to procreate, *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942), or the right to vote in state elections, *e. g., Reynolds* v. *Sims,* 377 U. S. 533 (1964), or the right to an appeal from a criminal conviction, *e. g., Griffin* v. *Illinois,* 351 U. S. 12 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

Thus, in *Buck* v. *Bell,* 274 U. S. 200 (1927), the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in *Skinner* v. *Oklahoma, supra,* at 541, the Court, without impugning the continuing validity of *Buck* v. *Bell,* held that "strict scrutiny" of state discrimination affecting procreation "is essential," for "[m]arriage and procreation are fundamental to the very existence and survival of the race." Recently, in *Roe* v. *Wade,* 410 U. S. 113, 152–154 (1973), the importance of procreation has, indeed, been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any "right" to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in *Buck* v. *Bell*. See *Roe* v. *Wade*, *supra*, at 154.

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[59] Indeed, the Court's theory would render the established concept of fundamental interests in the context of equal protection analysis superfluous, for the substantive constitutional right itself requires that this Court strictly scrutinize any asserted state interest for restricting or denying access to any particular guaranteed right, see, *e. g., United States* v. *O'Brien,* 391 U. S. 367, 377 (1968); *Cox* v. *Louisiana,* 379 U. S. 536, 545–551 (1965).

Similarly, the right to vote in state elections has been recognized as a "fundamental political right," because the Court concluded very early that it is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); see, *e. g.*, *Reynolds* v. *Sims*, *supra*, at 561–562. For this reason, "this Court has made clear that a citizen has a *constitutionally protected right* to participate in elections *on an equal basis with other citizens in the jurisdiction*." *Dunn* v. *Blumstein*, 405 U. S., at 336 (emphasis added). The final source of such protection from inequality in the provision of the state franchise is, of course, the Equal Protection Clause. Yet it is clear that whatever degree of importance has been attached to the state electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee.[60] See *Oregon* v. *Mitchell*, 400 U. S. 112 (1970); *Kramer* v. *Union School District*, 395 U. S. 621, 626–629 (1969); *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 665 (1966).

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[60] It is interesting that in its effort to reconcile the state voting rights cases with its theory of fundamentality the majority can muster nothing more than the contention that "[t]he constitutional underpinnings of the *right to equal treatment in the voting process* can no longer be doubted . . . ." *Ante*, at 34 n. 74 (emphasis added). If, by this, the Court intends to recognize a substantive constitutional "right to equal treatment in the voting process" independent of the Equal Protection Clause, the source of such a right is certainly a mystery to me.

Finally, it is likewise "true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin* v. *Illinois*, 351 U. S., at 18. Nevertheless, discrimination adversely affecting access to an appellate process which a State has chosen to provide has been considered to require close judicial scrutiny. See, *e. g., Griffin* v. *Illinois*, *supra; Douglas* v. *California*, 372 U. S. 353 (1963).[61]

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws," *ante*, at 33. Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights[62] implicit in the Fourteenth Amendment guarantee of due process of law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

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[61] It is true that *Griffin* and *Douglas* also involved discrimination against indigents, that is, wealth discrimination. But, as the majority points out, *ante*, at 28–29, the Court has never deemed wealth discrimination alone to be sufficient to require strict judicial scrutiny; rather, such review of wealth classifications has been applied only where the discrimination affects an important individual interest, see, *e. g., Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966). Thus, I believe *Griffin* and *Douglas* can only be understood as premised on a recognition of the fundamental importance of the criminal appellate process.

The effect of the interaction of individual interests with established constitutional guarantees upon the degree of care exercised by this Court in reviewing state discrimination affecting such interests is amply illustrated by our decision last Term in *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972). In *Baird,* the Court struck down as violative of the Equal Protection Clause a state statute which denied unmarried persons access to contraceptive devices on the same basis as married persons. The Court purported to test the statute under its traditional standard whether there is some rational basis for the discrimination effected. *Id.*, at 446–447. In the context of commercial regulation, the Court has indicated that the Equal Protection Clause "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S., at 425; *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 557 (1947). And this lenient standard is further weighted in the State's favor by the fact that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived [by the Court] to justify it." *McGowan* v. *Maryland*, *supra*, at 426. But in *Baird* the Court clearly did not adhere to these highly tolerant standards of traditional rational review. For although there were conceivable state interests intended to be advanced by the statute—*e. g.*, deterrence of premarital sexual activity and regulation of the dissemination of potentially dangerous articles—the Court was not prepared to accept these interests on their face, but instead proceeded to test their substantiality by independent analysis. See 405 U. S., at 449–454. Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests. See, *e. g.*, *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Kotch* v. *Board of River Port Pilot Comm'rs*, *supra*. Yet I think the Court's action was entirely appropriate, for access to and use of contraceptives bears a close relationship to the individual's constitutional right of privacy. See 405 U. S., at 453–454; *id.*, at 463–464 (WHITE, J., concurring in result). See also *Roe* v. *Wade*, 410 U. S., at 152–153.

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[62] See, *e. g., Duncan* v. *Louisiana,* 391 U. S. 145 (1968) (right to jury trial); *Washington* v. *Texas,* 388 U. S. 14 (1967) (right to compulsory process); *Pointer* v. *Texas,* 380 U. S. 400 (1965) (right to confront one's accusers).

A similar process of analysis with respect to the invidiousness of the basis on which a particular classification is drawn has also influenced the Court as to the appropriate degree of scrutiny to be accorded any particular case. The highly suspect character of classifications based on race,[63] nationality,[64] or alienage[65] is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as "discrete and insular minorities" who are relatively powerless to protect their interests in the political process. See *Graham* v. *Richardson,* 403 U. S., at 372; cf. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153, n. 4 (1938). Moreover, race, nationality, or alienage is " 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States,* 320 U. S. 81, 100." *McLaughlin* v. *Florida,* 379 U. S., at 192. Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality. It may be that all of these considerations, which make for particular judicial solicitude in the face of discrimination on the basis of race, nationality, or alienage, do not coalesce—or at least not to the same degree—in other forms of discrimination. Nevertheless, these considerations have undoubtedly influenced the care with which the Court has scrutinized other forms of discrimination.

In *James* v. *Strange,* 407 U. S. 128 (1972), the Court held unconstitutional a state statute which provided for recoupment from indigent convicts of legal defense fees paid by the State. The Court found that the statute impermissibly differentiated between indigent criminals in debt to the State and civil judgment debtors, since criminal debtors were denied various protective exemptions afforded civil judgment debtors.[66] The Court suggested that in reviewing the statute under the Equal Protection Clause, it was merely applying the traditional requirement that there be " 'some rationality' " in the line drawn between the different types of debtors. *Id.*, at 140. Yet it then proceeded to scrutinize the statute with less than traditional deference and restraint. Thus, the Court recognized "that state recoupment statutes may betoken legitimate state interests" in recovering expenses and discouraging fraud. Nevertheless, MR. JUSTICE POWELL, speaking for the Court, concluded that

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[63] See, *e. g., McLaughlin* v. *Florida,* 379 U. S. 184, 191–192 (1964); *Loving* v. *Virginia,* 388 U. S. 1, 9 (1967).

[64] See *Oyama* v. *California,* 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944).

[65] See *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971).

> "these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect." *Id.*, at 141–142.

The Court, in short, clearly did not consider the problems of fraud and collection that the state legislature might have concluded were peculiar to indigent criminal defendants to be either sufficiently important or at least sufficiently substantiated to justify denial of the protective exemptions afforded to all civil judgment debtors, to a class composed exclusively of indigent criminal debtors.

Similarly, in *Reed* v. *Reed*, 404 U. S. 71 (1971), the Court, in striking down a state statute which gave men preference over women when persons of equal entitlement apply for assignment as an administrator of a particular estate, resorted to a more stringent standard of equal protection review than that employed in cases involving commercial matters. The Court indicated that it was testing the claim of sex discrimination by nothing more than whether the line drawn bore "a rational relationship to a state objective," which it recognized as a legitimate effort to reduce the work of probate courts in choosing between competing applications for letters of administration. *Id.*, at 76. Accepting such a purpose, the Idaho Supreme Court had thought the classification to be sustainable on the basis that the legislature might have reasonably concluded that, as a rule, men have more experience than women in business matters relevant to the administration of an estate. 93 Idaho 511, 514, 465 P. 2d 635, 638 (1970). This Court, however, concluded that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ." 404 U. S., at 76. This Court, in other words, was unwilling to consider a theoretical and unsubstantiated basis for distinction—however reasonable it might appear—sufficient to sustain a statute discriminating on the basis of sex.

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[66] The Court noted that the challenged "provision strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books, and tools of trade." 407 U. S., at 135.

James and *Reed* can only be understood as instances in which the particularly invidious character of the classification caused the Court to pause and scrutinize with more than traditional care the rationality of state discrimination. Discrimination on the basis of past criminality and on the basis of sex posed for the Court the specter of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences. Still, the Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action. See *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972); *Levy* v. *Louisiana,* 391 U. S. 68 (1968).

In *Weber,* the Court struck down a portion of a state workmen's compensation statute that relegated unacknowledged illegitimate children of the deceased to a lesser status with respect to benefits than that occupied by legitimate children of the deceased. The Court acknowledged the true nature of its inquiry in cases such as these: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Id.,* at 173. Embarking upon a determination of the relative substantiality of the State's justifications for the classification, the Court rejected the contention that the classifications reflected what might be presumed to have been the deceased's preference of beneficiaries as "not compelling . . . where dependency on the deceased is a prerequisite to anyone's recovery . . . ." *Ibid.* Likewise, it deemed the relationship between the State's interest in encouraging legitimate family relationships and the burden placed on the illegitimates too tenuous to permit the classification to stand. *Ibid.* A clear insight into the basis of the Court's action is provided by its conclusion:

> "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection

> Clause does enable us to strike down discriminatory laws relating to status of birth . . . ." *Id.,* at 175–176.

Status of birth, like the color of one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations. Yet illegitimacy has long been stigmatized by our society. Hence, discrimination on the basis of birth—particularly when it affects innocent children—warrants special judicial consideration.

In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. Moreover, "[t]he extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls." *Dandridge* v. *Williams,* 397 U. S., at 520 (dissenting opinon). But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a "super-legislature." *Ante,* at 31. I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document. In truth, the Court itself will be open to the criticism raised by the majority so long as it continues on its present course of effectively selecting in private which cases will be afforded special consideration without acknowledging the true basis of its action.[67] Opinions such as those in *Reed* and *James* seem drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions. Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court. Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.

Nevertheless, the majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority singles this case out for analytic treatment at odds with what seems to me to be the clear trend of recent decisions in this Court, and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues. Yet if the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in this case, the unconstitutionality of that scheme is unmistakable.

B

Since the Court now suggests that only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis, and since it rejects the contention that public education is fundamental, it follows that the Court concludes that public education is not constitutionally guaranteed. It is true that this Court has never deemed the provision of free public education to be required by the Constitution. Indeed, it has on occasion suggested that state-supported education is a privilege bestowed by a State on its citizens. See *Missouri ex rel. Gaines* v. *Canada,* 305 U. S., at 349. Nevertheless, the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.

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[67] See generally Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

The special concern of this Court with the educational process of our country is a matter of common knowledge. Undoubtedly, this Court's most famous statement on the subject is that contained in *Brown* v. *Board of Education,* 347 U. S., at 493:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . ."

Only last Term, the Court recognized that "[p]roviding public schools ranks at the very apex of the function of a State." *Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (1972). This is clearly borne out by the fact that in 48 of our 50 States the provision of public education is mandated by the state constitution.[68] No other state function is so uniformly recognized[69] as an essential element of our society's well-being. In large measure, the explanation for the special importance attached to education must rest, as the Court recognized in *Yoder, id.*, at 221, on the facts that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . ," and that "education prepares individuals to be self-reliant and self-sufficient participants in society." Both facets of this observation are suggestive of the substantial relationship which education bears to guarantees of our Constitution.

Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life. This Court's decision in *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957), speaks of the right of students "to inquire, to study and to evaluate, to gain new maturity and understanding . . . ." Thus, we have not casually described the classroom as the " 'marketplace of ideas.' " *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967). The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech and association guaranteed to him by the First Amendment. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." [70]

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[68] See Brief of the National Education Association et al. as *Amici Curiae* App. A. All 48 of the 50 States which mandate public education also have compulsory-attendance laws which require school attendance for eight years or more. *Id.*, at 20–21.

[69] Prior to this Court's decision in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), every State had a constitutional provision directing the establishment of a system of public schools. But after *Brown,* South Carolina repealed its constitutional provision, and Mississippi made its constitutional provision discretionary with the state legislature.

Of particular importance is the relationship between education and the political process. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring). Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes.[71] Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation.[72] A system of "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968). But of most immediate and direct concern must be the demonstrated effect of education on the exercise of the franchise by the electorate. The right to vote in federal elections is conferred by Art. I, § 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is "preservative of other basic civil and political rights," *Reynolds* v. *Sims*, 377 U. S., at 562. Data from the Presidential Election of 1968 clearly demonstrate a direct relationship between participation in the electoral process and level of educational attainment; [73] and, as this Court recognized in *Gaston County* v. *United States*, 395 U. S. 285, 296 (1969), the quality of education offered may

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[70] Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1129 (1969).

[71] The President's Commission on School Finance, Schools, People, & Money: The Need for Educational Reform 11 (1972), concluded that "[l]iterally, we cannot survive as a nation or as individuals without [education]." It further observed that:

> "[I]n a democratic society, public understanding of public issues is necessary for public support. Schools generally include in their courses of instruction a wide variety of subjects related to the history, structure and principles of American government at all levels. In so doing, schools provide students with a background of knowledge which is deemed an absolute necessity for responsible citizenship." *Id.,* at 13–14.

[72] See J. Guthrie, G. Kleindorfer, H. Levin, & R. Stout, Schools and Inequality 103–105 (1971); R. Hess & J. Torney, The Develop-

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ment of Political Attitudes in Children 217-218 (1967); Campbell, The Passive Citizen, in 6 Acta Sociologica, Nos. 1-2, p. 9, at 20-21 (1962).

That education is the dominant factor in influencing political participation and awareness is sufficient, I believe, to dispose of the Court's suggestion that, in all events, there is no indication that Texas is not providing all of its children with a sufficient education to enjoy the right of free speech and to participate fully in the political process. *Ante*, at 36-37. There is, in short, no limit on the amount of free speech or political participation that the Constitution guarantees. Moreover, it should be obvious that the political process, like most other aspects of social intercourse, is to some degree competitive. It is thus of little benefit to an individual from a property-poor district to have "enough" education if those around him have more than "enough." Cf. *Sweatt* v. *Painter*, 339 U. S. 629, 633-634 (1950).

[73] See United States Department of Commerce, Bureau of the Census, Voting and Registration in the Election of November 1968, Current Population Reports, Series P-20, No. 192, Table 4, p. 17. See also Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., Levin, The Costs to the Nation of Inadequate Education 46-47 (Comm. Print 1972).

influence a child's decision to "enter or remain in school." It is this very sort of intimate relationship between a particular personal interest and specific constitutional guarantees that has heretofore caused the Court to attach special significance, for purposes of equal protection analysis, to individual interests such as procreation and the exercise of the state franchise.[74]

While ultimately disputing little of this, the majority seeks refuge in the fact that the Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice." *Ante,* at 36. This serves only to blur what is in fact at stake. With due respect, the issue is neither provision of the most *effective* speech nor of the most *informed* vote. Appellees do not now seek the best education Texas might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. The issue is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the precise question here is what importance should attach to education for purposes of equal protection analysis of that discrimination. As this Court held in *Brown* v. *Board of Education,* 347 U. S., at 493, the opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts[75]—a conclusion which is only strengthened when we consider the character of the classification in this case.

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[74] I believe that the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process makes this a different case from our prior decisions concerning discrimination affecting public welfare, see, *e. g., Dandridge* v. *Williams,* 397 U. S. 471 (1970), or housing, see, *e. g., Lindsey* v. *Normet,* 405 U. S. 56 (1972). There can be no question that, as the majority suggests, constitutional rights may be less meaningful for someone without enough to eat or without decent housing. *Ante,* at 37. But the crucial difference lies in the closeness of the relationship. Whatever the severity of the impact of insufficient food or inadequate housing on a person's life, they have never been considered to bear the same direct and immediate relationship to constitutional concerns for free speech and for our political processes as education has long been recognized to bear. Perhaps, the best evidence of this fact is the unique status which has been accorded public education as the single public service nearly unanimously guaranteed in the constitutions of our States, see *supra,* at 111–112 and n. 68. Education, in terms of constitutional values, is much more analogous, in my judgment, to the right to vote in state elections than to public welfare or public housing. Indeed, it is not without significance that we have long recognized education as an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency.

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[75] The majority's reliance on this Court's traditional deference to legislative bodies in matters of taxation falls wide of the mark in the context of this particular case. See *ante,* at 40–41. The decisions on which the Court relies were simply taxpayer suits challenging the constitutionality of a tax burden in the face of exemptions or differential taxation afforded to others. See, *e. g., Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522 (1959); *Madden* v. *Kentucky,* 309 U. S. 83 (1940); *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495 (1937); *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232 (1890). There is no question that, from the perspective of the taxpayer, the Equal Protection Clause "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various

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The District Court found that in discriminating between Texas schoolchildren on the basis of the amount of taxable property wealth located in the district in which they live, the Texas financing scheme created a form of wealth discrimination. This Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny. See, *e. g., Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Douglas* v. *California,* 372 U. S. 353 (1963); *McDonald* v. *Board of Election Comm'rs of Chicago,* 394 U. S. 802, 807 (1969). The majority, however, considers any wealth classification in this case to lack certain essential characteristics which it contends are common to the instances of wealth discrimination that this Court has heretofore recognized. We are told that in every prior case involving a wealth classification, the members of the disadvantaged class have "shared two distinguishing characteristics: be-

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products." *Allied Stores of Ohio* v. *Bowers, supra,* at 526–527. But in this case we are presented with a claim of discrimination of an entirely different nature—a claim that the revenue-producing mechanism directly discriminates against the interests of some of the intended beneficiaries; and, in contrast to the taxpayer suits, the interest adversely affected is of substantial constitutional and societal importance. Hence, a different standard of equal protection review than has been employed in the taxpayer suits is appropriate here. It is true that affirmance of the District Court decision would to some extent intrude upon the State's taxing power insofar as it would be necessary for the State to at least equalize taxable district wealth. But contrary to the suggestions of the majority, affirmance would not impose a straitjacket upon the revenue-raising powers of the State, and would certainly not spell the end of the local property tax. See *infra,* at 132.

cause of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Ante,* at 20. I cannot agree. The Court's distinctions may be sufficient to explain the decisions in *Williams* v. *Illinois,* 399 U. S. 235 (1970); *Tate* v. *Short,* 401 U. S. 395 (1971); and even *Bullock* v. *Carter,* 405 U. S. 134 (1972). But they are not in fact consistent with the decisions in *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966), or *Griffin* v. *Illinois, supra,* or *Douglas* v. *California, supra.*

In *Harper,* the Court struck down as violative of the Equal Protection Clause an annual Virginia poll tax of $1.50, payment of which by persons over the age of 21 was a prerequisite to voting in Virginia elections. In part, the Court relied on the fact that the poll tax interfered with a fundamental interest—the exercise of the state franchise. In addition, though, the Court emphasized that "[l]ines drawn on the basis of wealth or property . . . are traditionally disfavored." 383 U. S., at 668. Under the first part of the theory announced by the majority, the disadvantaged class in *Harper,* in terms of a wealth analysis, should have consisted only of those too poor to afford the $1.50 necessary to vote. But the *Harper* Court did not see it that way. In its view, the Equal Protection Clause "bars a system which excludes [from the franchise] those unable to pay a fee to vote or who *fail to pay.*" *Ibid.* (Emphasis added.) So far as the Court was concerned, the "degree of the discrimination [was] irrelevant." *Ibid.* Thus, the Court struck down the poll tax *in toto;* it did not order merely that those too poor to pay the tax be exempted; complete impecunity clearly was not determinative of the limits of the disadvantaged class, nor was it essential to make an equal protection claim.

Similarly, *Griffin* and *Douglas* refute the majority's contention that we have in the past required an absolute deprivation before subjecting wealth classifications to strict scrutiny. The Court characterizes *Griffin* as a case concerned simply with the denial of a transcript or an adequate substitute therefor, and *Douglas* as involving the denial of counsel. But in both cases the question was in fact whether "a State that [grants] *appellate review* can do so in a way that discriminates against some convicted defendants on account of their poverty." *Griffin* v. *Illinois, supra,* at 18 (emphasis added). In that regard, the Court concluded that inability to purchase a transcript denies "the poor an adequate *appellate review* accorded to all who have money enough to pay the costs in advance," *ibid.* (emphasis added), and that "the type of an *appeal* a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel," *Douglas* v. *California, supra,* at 355–356 (emphasis added). The right of appeal itself was not absolutely denied to those too poor to pay; but because of the cost of a transcript and of counsel, the appeal was a substantially less meaningful right for the poor than for the rich.[76] It was on these terms that the Court found a denial of equal protection, and those terms clearly encompassed degrees of discrimination on the basis of wealth which do not amount to outright denial of the affected right or interest.[77]

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[76] This does not mean that the Court has demanded precise equality in the treatment of the indigent and the person of means in the criminal process. We have never suggested, for instance, that the Equal Protection Clause requires the best lawyer money can buy for the indigent. We are hardly equipped with the objective standards which such a judgment would require. But we have pursued the goal of substantial equality of treatment in the face of clear disparities in the nature of the appellate process afforded rich versus poor. See, *e. g., Draper* v. *Washington,* 372 U. S. 487, 495–496 (1963); cf. *Coppedge* v. *United States,* 369 U. S. 438, 447 (1962).

This is not to say that the form of wealth classification in this case does not differ significantly from those recognized in the previous decisions of this Court. Our prior cases have dealt essentially with discrimination on the basis of personal wealth.[78] Here, by contrast, the children of the disadvantaged Texas school districts are being discriminated against not necessarily because of their personal wealth or the wealth of their families, but because of the taxable property wealth of the residents of the district in which they happen to live. The appropriate question, then, is whether the same degree of judicial solicitude and scrutiny that has previously been afforded wealth classifications is warranted here.

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[77] Even if I put aside the Court's misreading of *Griffin* and *Douglas*, the Court fails to offer any reasoned constitutional basis for restricting cases involving wealth discrimination to instances in which there is an absolute deprivation of the interest affected. As I have already discussed, see *supra*, at 88–89, the Equal Protection Clause guarantees equality of treatment of those persons who are similarly situated; it does not merely bar some form of excessive discrimination between such persons. Outside the context of wealth discrimination, the Court's reapportionment decisions clearly indicate that relative discrimination is within the purview of the Equal Protection Clause. Thus, in *Reynolds* v. *Sims*, 377 U. S. 533, 562–563 (1964), the Court recognized:

"It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. . . . Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. . . . One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' "

See also *Gray* v. *Sanders*, 372 U. S. 368, 380–381 (1963). The Court gives no explanation why a case involving wealth discrimination should be treated any differently.

[78] But cf. *Bullock* v. *Carter*, 405 U. S. 134, 144 (1972), where prospective candidates' threatened exclusion from a primary ballot because of their inability to pay a filing fee was seen as discrimination against both the impecunious candidates and the "less affluent

As the Court points out, *ante,* at 28–29, no previous decision has deemed the presence of just a wealth classification to be sufficient basis to call forth rigorous judicial scrutiny of allegedly discriminatory state action. Compare, *e. g., Harper* v. *Virginia Bd. of Elections, supra,* with, *e. g., James* v. *Valtierra,* 402 U. S. 137 (1971). That wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The "poor" may not be seen as politically powerless as certain discrete and insular minority groups.[79] Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups.[80] But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. While the "poor" have frequently been a

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segment of the community" that supported such candidates but was also too poor as a group to contribute enough for the filing fees.

[79] But cf. M. Harrington, The Other America 13–17 (Penguin ed. 1963).

[80] See E. Banfield, The Unheavenly City 63, 75–76 (1970); cf. R. Lynd & H. Lynd, Middletown in Transition 450 (1937).

legally disadvantaged group,[81] it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. See *Harper* v. *Virginia Bd. of Elections, supra.*

When evaluated with these considerations in mind, it seems to me that discrimination on the basis of group wealth in this case likewise calls for careful judicial scrutiny. First, it must be recognized that while local district wealth may serve other interests,[82] it bears no relationship whatsoever to the interest of Texas schoolchildren in the educational opportunity afforded them by the State of Texas. Given the importance of that interest, we must be particularly sensitive to the invidious characteristics of any form of discrimination that is not clearly intended to serve it, as opposed to some other distinct state interest. Discrimination on the basis of group wealth may not, to be sure, reflect the social stigma frequently attached to personal poverty. Nevertheless, insofar as group wealth discrimination involves wealth over which the disadvantaged individual has no significant control,[83] it represents in fact a more serious basis of discrimination than does personal wealth. For such discrimination is no reflection of the individual's characteristics or his abilities. And thus—particularly in the context of a disadvantaged class composed of children—we have previously treated discrimination on a basis which the individual cannot control as constitutionally disfavored. Cf. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972); *Levy* v. *Louisiana,* 391 U. S. 68 (1968).

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[81] Cf. *New York* v. *Miln,* 11 Pet. 102, 142 (1837).

[82] Theoretically, at least, it may provide a mechanism for implementing Texas' asserted interest in local educational control, see *infra,* at 126.

[83] True, a family may move to escape a property-poor school district, assuming it has the means to do so. But such a view would itself raise a serious constitutional question concerning an impermissible burdening of the right to travel, or, more precisely, the concomitant right to remain where one is. Cf. *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631 (1969).

The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests. Here legislative reallocation of the State's property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo, a problem not completely dissimilar to that faced by underrepresented districts prior to the Court's intervention in the process of reapportionment,[84] see *Baker* v. *Carr,* 369 U. S. 186, 191–192 (1962).

Nor can we ignore the extent to which, in contrast to our prior decisions, the State is responsible for the wealth discrimination in this instance. *Griffin, Douglas, Williams, Tate,* and our other prior cases have dealt with discrimination on the basis of indigency which was attributable to the operation of the private sector. But we have no such simple *de facto* wealth discrimination here. The means for financing public education in Texas are selected and specified by the State. It is the State that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth. At the same time, governmentally imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use,[85] and thus determined each district's amount of taxable property wealth. In short, this case, in contrast to the Court's previous wealth discrimination decisions, can only be seen as "unusual in the extent to which governmental action *is* the cause of the wealth classifications." [86]

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[84] Indeed, the political difficulties that seriously disadvantaged districts face in securing legislative redress are augmented by the fact that little support is likely to be secured from only mildly disadvantaged districts. Cf. *Gray* v. *Sanders,* 372 U. S. 368 (1963). See also n. 2, *supra.*

In the final analysis, then, the invidious characteristics of the group wealth classification present in this case merely serve to emphasize the need for careful judicial scrutiny of the State's justifications for the resulting interdistrict discrimination in the educational opportunity afforded to the schoolchildren of Texas.

D

The nature of our inquiry into the justifications for state discrimination is essentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests. See *Police Dept. of Chicago* v. *Mosley,* 408 U. S., at 95. Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification. In terms of the asserted state interests, the Court has indicated that it will require, for instance, a "compelling," *Shapiro* v. *Thompson,* 394 U. S., at 634, or a "substantial" or "important," *Dunn* v. *Blumstein,* 405 U. S., at 343, state interest to justify discrimination affecting individual interests of constitutional significance. Whatever the differences, if any, in these descriptions of the character of the state interest necessary to sustain such discrimination, basic to each is, I believe, a concern with the legitimacy and the reality of the asserted state interests. Thus, when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose,[87] but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve. Beyond the question of the adequacy of the State's purpose for the classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses to act as its action affects more directly interests of constitutional significance. See, *e. g., United States* v. *Robel,* 389 U. S. 258, 265 (1967); *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960). Thus, by now, "less restrictive alternatives" analysis is firmly established in equal protection jurisprudence. See *Dunn* v. *Blumstein, supra,* at 343; *Kramer* v. *Union School District,* 395 U. S., at 627. It seems to me that the range of choice we are willing to accord the State in selecting the means by which it will act, and the care with which we scrutinize the effectiveness of the means which the State selects, also must reflect the constitutional importance of the interest affected and the invidiousness of the particular classification. Here, both the nature of the interest and the classification dictate close judicial scrutiny of the purposes which Texas seeks to serve with its present educational financing scheme and of the means it has selected to serve that purpose.

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[85] See Tex. Cities, Towns and Villages Code, Civ. Stat. Ann. §§ 1011a–1011j (1963 and Supp. 1972–1973). See also, *e. g., Skinner* v. *Reed,* 265 S. W. 2d 850 (Tex. Ct. Civ. App. 1954); *Corpus Christi* v. *Jones,* 144 S. W. 2d 388 (Tex. Ct. Civ. App. 1940).

[86] *Serrano* v. *Priest,* 5 Cal. 3d, at 603, 487 P. 2d, at 1254. See also *Van Dusartz* v. *Hatfield,* 334 F. Supp., at 875–876.

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[87] Cf., *e. g., Two Guys from Harrison-Allentown* v. *McGinley,* 366 U. S. 582 (1961); *McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Goesaert* v. *Cleary,* 335 U. S. 464 (1948).

The only justification offered by appellants to sustain the discrimination in educational opportunity caused by the Texas financing scheme is local educational control. Presented with this justification, the District Court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications." 337 F. Supp., at 284. I must agree with this conclusion.

At the outset, I do not question that local control of public education, as an abstract matter, constitutes a very substantial state interest. We observed only last Term that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Wright* v. *Council of the City of Emporia,* 407 U. S. 451, 469 (1972). See also *id.,* at 477-478 (BURGER, C. J., dissenting). The State's interest in local educational control—which certainly includes questions of educational funding—has deep roots in the inherent benefits of community support for public education. Consequently, true state dedication to local control would present, I think, a substantial justification to weigh against simply interdistrict variations in the treatment of a State's schoolchildren. But I need not now decide how I might ultimately strike the balance were we confronted with a situation where the State's sincere concern for local control inevitably produced educational inequality. For, on this record, it is apparent that the State's purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.

In Texas, statewide laws regulate in fact the most minute details of local public education. For example, the State prescribes required courses.[88] All textbooks must be submitted for state approval,[89] and only approved textbooks may be used.[90] The State has established the qualifications necessary for teaching in Texas public schools and the procedures for obtaining certification.[91] The State has even legislated on the length of the school day.[92] Texas' own courts have said:

> "As a result of the acts of the Legislature our school system is not of mere local concern but it is statewide. While a school district is local in territorial limits, it is an integral part of the vast school system which is coextensive with the confines of the State of Texas." *Treadaway* v. *Whitney Independent School District,* 205 S. W. 2d 97, 99 Tex. Ct. Civ. App. 1947).

See also *El Dorado Independent School District* v. *Tisdale,* 3 S. W. 2d 420, 422 (Tex. Comm'n App. 1928).

Moreover, even if we accept Texas' general dedication to local control in educational matters, it is difficult to find any evidence of such dedication with respect to fiscal matters. It ignores reality to suggest—as the Court does, *ante,* at 49–50—that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local fiscal control. If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district—a factor over which local voters can exercise no control.

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[88] Tex. Educ. Code Ann. §§ 21.101–21.117. Criminal penalties are provided for failure to teach certain required courses. *Id.,* §§ 4.15–4.16.

[89] *Id.,* §§ 12.11–12.35.

[90] *Id.,* § 12.62.

[91] *Id.,* §§ 13.031–13.046.

[92] *Id.,* § 21.004.

The study introduced in the District Court showed a direct inverse relationship between equalized taxable district property wealth and district tax effort with the result that the property-poor districts making the highest tax effort obtained the lowest per-pupil yield.[93] The implications of this situation for local choice are illustrated by again comparing the Edgewood and Alamo Heights School Districts. In 1967–1968, Edgewood, after contributing its share to the Local Fund Assignment, raised only $26 per pupil through its local property tax, whereas Alamo Heights was able to raise $333 per pupil. Since the funds received through the Minimum Foundation School Program are to be used only for minimum professional salaries, transportation costs, and operating expenses, it is not hard to see the lack of local choice—with respect to higher teacher salaries to attract more and better teachers, physical facilities, library books, and facilities, special courses, or participation in special state and federal matching funds programs—under which a property-poor district such as Edgewood is forced to labor.[94] In fact, because of the difference in taxable local property wealth, Edgewood would have to tax itself almost nine times as heavily to obtain the same yield as Alamo Heights.[95] At present, then, local control is a myth for many of the local school districts in Texas. As one district court has observed, "rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes)." *Van Dusartz* v. *Hatfield,* 334 F. Supp. 870, 876 (Minn. 1971).

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[93] See Appendix II, *infra*.

[94] See Affidavit of Dr. Jose Cardenas, Superintendent of Schools, Edgewood Independent School District, App. 234–238.

In my judgment, any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control.[96] At the same time, appellees have pointed out a variety of alternative financing schemes which may serve the State's purported interest in local control as well as, if not better than, the present scheme without the current impairment of the educational opportunity of vast numbers of Texas schoolchildren.[97] I see no need, however, to explore the practical or constitutional merits of those suggested alternatives at this time for, whatever their positive or negative features, experience with the present financing scheme impugns any suggestion that it constitutes a serious effort to provide local fiscal control. If, for the sake of local education control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us.

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[95] See Appendix IV, *infra.*

[96] My Brother WHITE, in concluding that the Texas financing scheme runs afoul of the Equal Protection Clause, likewise finds on analysis that the means chosen by Texas—local property taxation dependent upon local taxable wealth—is completely unsuited in its present form to the achievement of the asserted goal of providing local fiscal control. Although my Brother WHITE purports to reach this result by application of that lenient standard of mere rationality traditionally applied in the context of commercial interests, it seems to me that the care with which he scrutinizes the practical effectiveness of the present local property tax as a device for affording local fiscal control reflects the application of a more stringent standard of review, a standard which at the least is influenced by the constitutional significance of the process of public education.

[97] See n. 98, *infra.*

III

In conclusion, it is essential to recognize that an end to the wide variations in taxable district property wealth inherent in the Texas financing scheme would entail none of the untoward consequences suggested by the Court or by the appellants.

First, affirmance of the District Court's decisions would hardly sound the death knell for local control of education. It would mean neither centralized decisionmaking nor federal court intervention in the operation of public schools. Clearly, this suit has nothing to do with local decisionmaking with respect to educational policy or even educational spending. It involves only a narrow aspect of local control—namely, local control over the raising of educational funds. In fact, in striking down interdistrict disparities in taxable local wealth, the District Court took the course which is most likely to make true local control over educational decisionmaking a reality for *all* Texas school districts.

Nor does the District Court's decision even necessarily eliminate local control of educational funding. The District Court struck down nothing more than the continued interdistrict wealth discrimination inherent in the present property tax. Both centralized and decentralized plans for educational funding not involving such interdistrict discrimination have been put forward.[98] The choice among these or other alternatives would remain with the State, not with the federal courts. In this regard, it should be evident that the degree of federal intervention

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[98] Centralized educational financing is, to be sure, one alternative. On analysis, though, it is clear that even centralized financing would

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not deprive local school districts of what has been considered to be the essence of local educational control. See *Wright* v. *Council of the City of Emporia,* 407 U. S. 451, 477–478 (BURGER, C. J., dissenting). Central financing would leave in local hands the entire gamut of local educational policymaking—teachers, curriculum, school sites, the whole process of allocating resources among alternative educational objectives.

A second possibility is the much-discussed theory of district power equalization put forth by Professors Coons, Clune, and Sugarman in their seminal work, Private Wealth and Public Education 201–242 (1970). Such a scheme would truly reflect a dedication to local fiscal control. Under their system, each school district would receive a fixed amount of revenue per pupil for any particular level of tax effort regardless of the level of local property tax base. Appellants criticize this scheme on the rather extraordinary ground that it would encourage poorer districts to overtax themselves in order to obtain substantial revenues for education. But under the present discriminatory scheme, it is the poor districts that are already taxing themselves at the highest rates, yet are receiving the lowest returns.

District wealth reapportionment is yet another alternative which would accomplish directly essentially what district power equalization would seek to do artificially. Appellants claim that the calculations concerning state property required by such a scheme would be impossible as a practical matter. Yet Texas is already making far more complex annual calculations—involving not only local property values but also local income and other economic factors—in conjunction with the Local Fund Assignment portion of the Minimum Foundation School Program. See 5 Governor's Committee Report 43–44.

A fourth possibility would be to remove commercial, industrial, and mineral property from local tax rolls, to tax this property on a statewide basis, and to return the resulting revenues to the local districts in a fashion that would compensate for remaining variations in the local tax bases.

None of these particular alternatives are necessarily constitutionally compelled; rather, they indicate the breadth of choice which would remain to the State if the present interdistrict disparities were eliminated.

in matters of local concern would be substantially less in this context than in previous decisions in which we have been asked effectively to impose a particular scheme upon the States under the guise of the Equal Protection Clause. See, *e. g., Dandridge* v. *Williams,* 397 U. S. 471 (1970); cf. *Richardson* v. *Belcher,* 404 U. S. 78 (1971).

Still, we are told that this case requires us "to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests." *Ante,* at 40. Yet no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a device for raising educational funds. The District Court's decision, at most, restricts the power of the State to make educational funding dependent exclusively upon local property taxation so long as there exists interdistrict disparities in taxable property wealth. But it hardly eliminates the local property tax as a source of educational funding or as a means of providing local fiscal control.[99]

The Court seeks solace for its action today in the possibility of legislative reform. The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more. The possibility of legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified state discrimination. In this case we have been presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of large constitutional and practical importance. To support the demonstrated discrimination in the provision of educational opportunity the State has offered a justification which, on analysis, takes on at best an ephemeral character. Thus, I believe that the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the Equal Protection Clause.[100]

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[99] See n. 98, *supra.*

I would therefore affirm the judgment of the District Court.

[Appendices I–IV are on the immediately following pages.]

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[100] Of course, nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions. See *Milliken* v. *Green,* 389 Mich. 1, 203 N. W. 2d 457 (1972), rehearing granted, Jan. 1973; *Robinson* v. *Cahill,* 118 N. J. Super. 223, 287 A. 2d 187, 119 N. J. Super. 40, 289 A. 2d 569 (1972); cf. *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P. 2d 1241 (1971).

APPENDIX I TO OPINION OF MARSHALL, J., DISSENTING

REVENUES OF TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUES AND SOURCE OF FUNDS

CATEGORIES Market Value of Taxable Property Per Pupil	Local Revenues Per Pupil	State Revenues Per Pupil	State and Local Revenues Per Pupil (Columns 1 and 2)	Federal Revenues Per Pupil	Total Revenues Per Pupil (State-Local-Federal, Columns 1, 2 and 4)
Above $100,000 (10 districts)	$610	$205	$815	$41	$856
$100,000–$50,000 (26 districts)	287	257	544	66	610
$50,000–$30,000 (30 districts)	224	260	484	45	529
$30,000–$10,000 (40 districts)	166	295	461	85	546
Below $10,000 (4 districts)	63	243	306	135	441

Based on Table V to affidavit of Joel S. Berke, App. 208, which was prepared on the basis of a sample of 110 selected Texas school districts from data for the 1967–1968 school year.

APPENDIX II TO OPINION OF MARSHALL, J., DISSENTING

TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUES, EQUALIZED TAX RATES, AND YIELD OF RATES

CATEGORIES Market Value of Taxable Property Per Pupil	EQUALIZED TAX RATES ON $100	YIELD PER PUPIL (Equalized Rate Applied to District Market Value)
Above $100,000 (10 districts)	$.31	$585
$100,000-$50,000 (26 districts)	.38	262
$50,000-$30,000 (30 districts)	.55	213
$30,000-$10,000 (40 districts)	.72	162
Below $10,000 (4 districts)	.70	60

Based on Table II to affidavit of Joel S. Berke, App. 205, which was prepared on the basis of a sample of 110 selected Texas school districts from data for the 1967-1968 school year.

APPENDIX III TO OPINION OF MARSHALL, J., DISSENTING

SELECTED BEXAR COUNTY, TEXAS, SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUATION AND SELECTED INDICATORS OF EDUCATIONAL QUALITY

Selected Districts From High to Low by Market Valuation Per Pupil	Professional Salaries Per Pupil	Per Cent of Teachers With College Degrees	Per Cent of Teachers With Masters Degrees	Per Cent of Total Staff With Emergency Permits	Student-Counselor Ratios	Professional Personnel Per 100 Pupils
ALAMO HEIGHTS	$372	100%	40%	11%	645	4.80
NORTH EAST	288	99	24	7	1,516	4.50
SAN ANTONIO	251	98	29	17	2,320	4.00
NORTH SIDE	258	99	20	17	1,493	4.30
HARLANDALE	243	94	21	22	1,800	4.00
EDGEWOOD	209	96	15	47	3,098	4.06

Based on Table XI to affidavit of Joel S. Berke, App. 220, which was prepared on the basis of a sample of six selected school districts located in Bexar County, Texas, from data for the 1967–1968 school year.

APPENDIX IV TO OPINION OF MARSHALL, J., DISSENTING

BEXAR COUNTY, TEXAS, SCHOOL DISTRICTS RANKED BY EQUALIZED PROPERTY VALUE AND TAX RATE REQUIRED TO GENERATE HIGHEST YIELD IN ALL DISTRICTS

Districts Ranked from High to Low Market Valuation Per Pupil	Tax Rate Per $100 Needed to Equal Highest Yield
ALAMO HEIGHTS	$0.68
JUDSON	1.04
EAST CENTRAL	1.17
NORTH EAST	1.21
SOMERSET	1.32
SAN ANTONIO	1.56
NORTH SIDE	1.65
SOUTH WEST	2.10
SOUTH SIDE	3.03
HARLANDALE	3.20
SOUTH SAN ANTONIO	5.77
EDGEWOOD	5.76

Based on Table IX to affidavit of Joel S. Berke, App. 218, which was prepared on the basis of the 12 school districts located in Bexar County, Texas, from data from the 1967–1968 school year.

CAMP, COMPTROLLER OF THE CURRENCY *v.* PITTS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-864. Decided March 26, 1973

The appropriate standard for judicial review of a decision by the Comptroller of the Currency denying a national bank charter is whether his adjudication was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The District Court is to review the administrative record already in existence, supplemented if necessary by affidavits or testimony amplifying the reason for the Comptroller's decision, and is not authorized by the National Bank Act or the Administrative Procedure Act to conduct a *de novo* hearing in which the "substantial evidence" test is to be applied. Cf. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402.

Certiorari granted; 463 F. 2d 632, vacated and remanded.

PER CURIAM.

In its present posture this case presents a narrow, but substantial, question with respect to the proper procedure to be followed when a reviewing court determines that an administrative agency's stated justification for informal action does not provide an adequate basis for judicial review.

In 1967, respondents submitted an application to the Comptroller of the Currency for a certificate authorizing them to organize a new bank in Hartsville, South Carolina. See 12 U. S. C. § 27; 12 CFR § 4.2 (1972). On the basis of information received from a national bank examiner and from various interested parties, the Comptroller denied the application and notified respondents of his decision through a brief letter, which stated in part: "[W]e have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable." No formal hearings were required by the controlling statute or guaranteed by the applicable regulations, although the latter provided for hearings when requested and when granted at the discretion of the Comptroller.[1] Respondents did not request a formal hearing but asked for reconsideration. That request was granted and a supplemental field examination was conducted, whereupon the Comptroller again denied the application, this time stating in a letter that "we were unable to reach a favorable conclusion as to the need factor," and explaining that conclusion to some extent.[2] Respondents then brought an action in federal district court seeking review of the Comptroller's decision. The entire administrative record was placed before the court, and, upon an examination of that record and of the two letters of explanation, the court granted summary judgment against respondents, holding that *de novo* review was not warranted in the circumstances and finding that "although the Comptroller may have erred, there is substantial basis for his determination, and . . . it was neither capricious nor arbitrary." 329 F. Supp. 1302, 1308. On appeal, the Court of Appeals did not reach the merits. Rather, it held that the Comptroller's ruling was "unacceptable" because "its basis" was not stated with sufficient clarity to permit judicial review. 463 F. 2d 632, 633. For the present, the Comptroller does not challenge this aspect of the court's decision. He does, however, seek review here of the procedures that the Court of Appeals specifically ordered to be followed in the District Court on remand. The court held that the case should be remanded "for a trial de novo before the District Court" because "the Comptroller has twice inadequately and inarticulately resolved the [respondents'] presentation." The court further specified that in the District Court, respondents "will open the trial with proof of their application and compliance with the statutory inquiries, and proffer of any other relevant evidence." Then, "[t]estimony may . . . be adduced by the Comptroller or intervenors manifesting opposition, if any, to the new bank." On the basis of the record thus made, the District Court was instructed to make its own findings of fact and conclusions of law in order to determine "whether the [respondents] have shown by a preponderance of evidence that the Comptroller's ruling is capricious or an abuse of discretion." 463 F. 2d, at 634.

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[1] See 12 CFR § 4.12 (d) (1967). The regulations were amended in 1971, 36 Fed. Reg. 5051. For the present regulation, see 12 CFR § 5.4 (1972).

[2] The letter reads in part:

"On each application we endeavor to develop the need and convenience factors in conjunction with all other banking factors and in this case we were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served by the Peoples Bank with deposits of $7.2MM, The Bank of Hartsville with deposits of $12.8MM, The First Federal Savings and Loan Association with deposits of $5.4MM, The Mutual Savings and Loan Association with deposits of $8.2MM and the Sonoco Employees Credit Union with deposits of $6.5MM. The aforementioned are as of December 31, 1968."

We agree with the Comptroller that the trial procedures thus outlined by the Court of Appeals for the remand in this case are unwarranted under present law.

Unquestionably, the Comptroller's action is subject to judicial review under the Administrative Procedure Act (APA), 5 U. S. C. § 701. See *Association of Data Processing Service Organizations* v. *Camp,* 397 U. S. 150, 156–158 (1970). But it is also clear that neither the National Bank Act nor the APA requires the Comptroller to hold a hearing or to make formal findings on the hearing record when passing on applications for new banking authorities. See 12 U. S. C. § 26; 5 U. S. C. § 557.[3] Accordingly, the proper standard for judicial review of the Comptroller's adjudications is not the "substantial evidence" test which is appropriate when reviewing findings made on a hearing record, 5 U. S. C. § 706 (2)(E). Nor was the reviewing court free to hold a *de novo* hearing under § 706 (2)(F) and thereafter determine whether the agency action was "unwarranted by the facts." It is quite plain from our decision in *Citizens to Preserve*

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[3] Title 12 U. S. C. § 26 contemplates a wide-ranging *ex parte* investigation; it reads as follows:

"*Comptroller to determine if association can commence business.*

"Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, *the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking;* and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking." (Emphasis added.)

As to the APA, its requirement of a written statement of "findings and conclusions, and the reasons or basis therefor" (5 U. S. C. § 557 (c)(3)(A)), applies only to rulemaking proceedings (§ 553) and to adjudications "required by statute to be determined on the record after opportunity for an agency hearing" (§ 554 (a)). By its terms, then, the APA's requirement of formal findings is not relevant since the National Bank Act plainly does not require agency hearings on applications for new banks.

Overton Park v. *Volpe,* 401 U. S. 402 (1971), that *de novo* review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions. *Id.,* at 415. Neither situation applies here. The proceeding in the District Court was obviously not brought to enforce the Comptroller's decision, and the only deficiency suggested in agency action or proceedings is that the Comptroller inadequately explained his decision. As *Overton Park* demonstrates, however, that failure, if it occurred in this case, is not a deficiency in factfinding procedures such as to warrant the *de novo* hearing ordered in this case.

The appropriate standard for review was, accordingly, whether the Comptroller's adjudication was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as specified in 5 U. S. C. § 706 (2)(A). In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. Respondents contend that the Court of Appeals did not envision a true *de novo* review and that, at most, all that was called for was the type of "plenary review" contemplated by *Overton Park, supra,* at 420. We cannot agree. The present remand instructions require the Comptroller and other parties to make an evidentiary record before the District Court "manifesting opposition, if any, to the new bank." The respondents were also to be afforded opportunities to support their application with "any other relevant evidence." These instructions seem to put aside the extensive administrative record already made and presented to the reviewing court.

If, as the Court of Appeals held and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a *de novo* hearing but, as contemplated by *Overton Park,* to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary. We add a caveat, however. Unlike *Overton Park,* in the present case there was contemporaneous explanation of the agency decision. The explanation may have been curt, but it surely indicated the determinative reason for the final action taken: the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community. The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration. See *SEC* v. *Chenery Corp.,* 318 U. S. 80 (1943). It is in this context that the Court of Appeals should determine whether and to what extent, in the light of the administrative record, further explanation is necessary to a proper assessment of the agency's decision.

The petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

OHIO MUNICIPAL JUDGES ASSN. ET AL. v. DAVIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

No. 72-1010. Decided March 26, 1973

Appellants' challenge to state constitutional provision, which District Court dismissed for inability to grant relief sought, *held* to be without merit.

Affirmed.

PER CURIAM.

The motion of American Civil Liberties Union of Ohio, Inc., for leave to file a brief, as *amicus curiae,* is granted.

On the ground that it was beyond its authority to grant the primary relief sought, the United States District Court dismissed appellants' suit which alleged that Art. IV, § 6 (B), of the Ohio Constitution denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The judgment is affirmed, but on the ground that appellants' constitutional challenge to Art. IV, § 6 (B), was without merit.

So ordered.

MESCALERO APACHE TRIBE v. JONES, COMMISSIONER, BUREAU OF REVENUE OF NEW MEXICO, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

No. 71-738. Argued December 12, 1972—Decided March 27, 1973

The State of New Mexico may impose a nondiscriminatory gross receipts tax on a ski resort operated by petitioner Tribe on off-reservation land that the Tribe leased from the Federal Government under § 5 of the Indian Reorganization Act, 25 U. S. C. § 465. Though § 465 exempts the land acquired from state and local taxation, neither that provision nor the federal-instrumentality doctrine bars taxing income from the land. But § 465 bars a use tax that the State seeks to impose on personalty that the Tribe purchased out of State and which, having been installed as a permanent improvement at the resort, became so intimately connected with the land itself as to be encompassed by the statutory exemption. Pp. 147-159.

83 N. M. 158, 489 P. 2d 666, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which BRENNAN and STEWART, JJ., joined, *post*, p. 159.

George E. Fettinger argued the cause for petitioner. With him on the briefs was *F. Randolph Burroughs*.

John C. Cook, Assistant Attorney General of New Mexico, argued the cause for respondents. With him on the brief was *David L. Norvell*, Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Frizzell, Harry R. Sachse, Carl Strass*, and *Eva R. Datz* for the United States; by *Arthur Lazarus, Jr., Philip P. Ashby, Royal D. Marks*, and *George P. Vlassis* for the Association on American Indian Affairs, Inc., et al.; by *David H. Getches* for the Native American Rights Fund; by *Samuel W. Murphy, Jr.*, and *William C. Pelster* for Montana Inter-

MR. JUSTICE WHITE delivered the opinion of the Court.

The Mescalero Apache Tribe operates a ski resort in the State of New Mexico, on land located outside the boundaries of the Tribe's reservation. The State has asserted the right to impose a tax on the gross receipts of the ski resort and a use tax on certain personalty purchased out of State and used in connection with the resort. Whether paramount federal law permits these taxes to be levied is the issue presented by this case.

The home of the Mescalero Apache Tribe is on reservation lands in Lincoln and Otero Counties in New Mexico. The Sierra Blanca Ski Enterprises, owned and operated by the Tribe, is adjacent to the reservation and was developed under the auspices of the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U. S. C. § 461 *et seq.*[1] After a feasibility study by the Bureau of Indian Affairs, equipment and construction money was provided by a loan from the Federal Government under § 10 of the Act, 25 U. S. C. § 470, and the necessary land was leased from the United States Forest Service for a term of 30 years. The ski area borders on the Tribe's reservation but, with the exception of some cross-country ski trails, no part of the enterprise, its buildings, or equipment is located within the existing boundaries of the reservation.

The Tribe has paid under protest $26,086.47 in taxes to the State, pursuant to the sales tax law, N. M. Stat.

Tribal Policy Board; and by *Raymond C. Simpson* for Agua Caliente Band of Mission Indians.

William D. Dexter, Assistant Attorney General of Washington, and *Eugene F. Corrigan* filed a brief for Multistate Tax Commission as *amicus curiae* urging affirmance.

[1] In 1936, the Tribe adopted a constitution, pursuant to § 16 of the Act, 25 U. S. C. § 476.

Ann. § 72–16–1 *et seq.* (1953), based on the gross receipts of the ski resort from the sale of services and tangible property.[2] In addition, in 1968 the State assessed compensating use taxes against the Tribe in the amount of $5,887.19 (plus penalties and interest), based on the purchase price of materials used to construct two ski lifts at the resort. N. M. Stat. Ann. § 72–17–1 *et seq.* (1953). The Tribe duly protested the use tax assessment and sought a refund of the sales taxes paid. The State Commissioner of Revenue denied both the claim for refund and the protest of assessment and the Court of Appeals of the State affirmed. The court held, essentially, that the State had authority to apply its nondiscriminatory taxes to the Tribe's enterprise and property involved in the dispute, and that the Indian Reorganization Act did not render the Tribe's enterprise a federal instrumentality, constitutionally immune from state taxation, nor did it, by its own terms, grant immunity from the taxes here involved. 83 N. M. 158, 489 P. 2d 666 (1971). The Supreme Court of New Mexico denied certiorari. 83 N. M. 151, 489 P. 2d 659 (1971). We granted the Tribe's petition for a writ of certiorari, 406 U. S. 905, to consider its claim that the income and property of the ski resort are not properly subject to state taxation. We affirm in part and in part reverse.

I

At the outset, we reject—as did the state court—the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land."[3] Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester* v. *Georgia,* 6 Pet. 515, 556–561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See *McClanahan* v. *Arizona State Tax Comm'n, post,* p. 164; *Organized Village of Kake* v. *Egan,* 369 U. S. 60, 71–73 (1962). The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. *Organized Village of Kake, supra,* at 75; *Williams* v. *Lee,* 358 U. S. 217 (1959); *New York ex rel. Ray* v. *Martin,* 326 U. S. 496, 499 (1946); *Draper* v. *United States,* 164 U. S. 240 (1896). Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n, supra,* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

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[2] The Tribe asserts that "no sales tax (gross receipts tax) is being . . . charged for any ski rentals, lift tickets, food or beverages."

But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake, supra,* at 75. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, *e. g., Puyallup Tribe* v. *Department of Game,* 391 U. S. 392, 398 (1968); *Organized Village of Kake, supra,* at 75–76; *Tulee* v. *Washington,* 315 U. S. 681, 683 (1942); *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575 (1928); *Ward* v. *Race Horse,* 163 U. S. 504 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see *Ward* v. *Race Horse, supra,* at 516, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake, supra.*

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[3] Brief for Petitioner 16.

The Enabling Act for New Mexico, 36 Stat. 557,[4] reflects the distinction between on- and off-reservation activities. Section 2 of the Act provides that the people of the State disclaim "all right and title" to lands "owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States . . . and that . . . the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." But the Act expressly provides, with respect to taxation, that "nothing herein . . . shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted . . . or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but . . . all such lands shall be exempt from taxation by said State [only] so long and to such extent as Congress has prescribed or may hereafter prescribe." It is thus clear that in terms of general power New Mexico retained the right to tax, unless Congress forbade it, all Indian land and Indian activities located or occurring "outside of an Indian reservation." [5]

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[4] A corresponding provision appears in the Constitution of the State of New Mexico, Art. XXI, § 2.

We also reject the broad claim that the Indian Reorganization Act of 1934 rendered the Tribe's off-reservation ski resort a federal instrumentality constitutionally immune from state taxes of all sorts. *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819). The intergovernmental-immunity doctrine was once much in vogue in a variety of contexts and, with respect to Indian affairs, was consistently held to bar a state tax on the lessees of, or the product or income from, restricted lands of tribes or individual Indians. The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and reflected in *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376 (1938); *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598 (1943); and *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342 (1949), where the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation. Rather, the Court held that Congress has the power "to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action" and that "[t]he question whether immunity shall be extended in situations like these is essentially legislative in character." *Oklahoma Tax Comm'n* v. *Texas Co., supra,* at 365-366.

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[5] The Tribe's treaty with the United States, 10 Stat. 979, which acknowledges that the Tribe is "exclusively under the laws, jurisdiction, and government of the United States . . . ," does not alter the obvious effect of the State's admission legislation. See, *e. g., Organized Village of Kake* v. *Egan,* 369 U. S. 60, 67-68 (1962), and cases cited therein.

The Indian Reorganization Act of 1934 neither requires nor counsels us to recognize this tribal business venture as a federal instrumentality. Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation. Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe.[6] As was true in the case before us, a tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people.[7] So viewed, an enterprise such as the ski resort in this case serves a federal function with respect to the Government's role in Indian affairs. But the "mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation." *Choctaw, Oklahoma & Gulf R. Co.* v. *Mackey,* 256 U. S. 531, 536 (1921). See also *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150, 154 (1897).

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[6] See generally U. S. Dept. of the Interior, Federal Indian Law 129–132 (1958), a revision of Handbook of Federal Indian Law, prepared under the editorial direction of Felix S. Cohen, first printed in 1940 (hereinafter Federal Indian Law); Comment, Tribal Self-Government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955 (1972).

[7] For other examples see Comment, n. 6, *supra,* at 983–985. See also J. Collier, On the Gleaming Way 149, 129–149 (1962).

The intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). See also S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934). As Senator Wheeler, on the floor, put it:

> "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians." 78 Cong. Rec. 11125.

Representative Howard explained that:

> "The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition." *Id.*, at 11732.[8]

The Reorganization Act did not strip Indian tribes and their reservation lands of their historic immunity from state and local control.[9] But, in the context of the Reorganization Act, we think it unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of the Government." *Department of Employment* v. *United States,* 385 U. S. 355, 359–360 (1966). Cf. *Clallam County* v. *United States,* 263 U. S. 341 (1923). On the contrary, the aim was to disentangle the tribes from the official bureaucracy. The Court's decision in *Organized Village of Kake, supra,* which involved tribes organized under the Reorganization Act, demonstrates that off-reservation activities are within the reach of state law. See also *Puyallup Tribe,* 391 U. S., at 398. What was said in *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575 (1928), is relevant here. At issue there was the taxability of off-reservation Indian land purchased with consent of the Secretary of the Interior with the accumulated royalties from the in-

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[8] See also *id.*, at 11727, 11731–11732 (remarks of Rep. Howard); the statements of Mr. John Collier, the Commissioner of Indian Affairs, in Hearings on H. R. 7902, before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 37, 60, 65–67 (1934) (hereinafter 1934 House Hearings).

[9] The predecessor bills to the Wheeler-Howard Act, H. R. 7902 and S. 2755 (respectively 78 Cong. Rec. 2437 and 2440), expressly provided that the chartered Indian communities may act "as a Federal agency in the administration of Indian Affairs," and, correspondingly, that the United States would not "be liable for any act done . . . by a chartered Indian community." Title I,

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§ 4 (i). 1934 House Hearings 3. The bills further provided that: "Nothing in this Act shall be construed as rendering the property of any Indian community . . . subject to taxation by any State or subdivision thereof . . . ." Tit. I, § 11. *Id.,* at 5. The memorandum of John Collier, which accompanied the bills, stated that "[a]s a Federal agency, the property of a chartered community is constitutionally exempt from State taxation . . . ." *Id.,* at 25. These extensive provisions for tax immunity were discarded in the Wheeler-Howard Act, along with the accompanying provisions for more extensive governmental powers on the part of the chartered communities. See H. R. Rep. No. 1804, *supra,* at 6. We do not read this legislative history, however, as suggesting that Congress intended to remove the traditional tax immunity that Indian tribes enjoyed on their reservations. This reading finds support in Felix S. Cohen's treatise, see Federal Indian Law 852–853, although we believe that the broader thrust of his statement—that any "attempt by a State to impose income or other types of taxes" upon "tribal corporations organized under the Indian Reorganization Act . . . would still be held a direct burden on a Federal instrumentality"—is not supported by the modern cases and should be read with and in the light of other discussions of the immunity doctrine in particularized contexts. See *id.,* at 872–873, 864–873.

dividual Indian's restricted allotted lands. Alienation of the purchased land was federally restricted. In rejecting a claim that state taxation of the land was barred by the federal-instrumentality doctrine,[10] the then Mr. Justice Stone wrote for a unanimous Court:

> "What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them. . . .
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> . . . . .
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> "The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners. . . .
>
> . . . . .
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> "In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But . . . [t]o hold them immune would be inconsistent with one of the

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[10] The claim of tax immunity was made by a non-Indian lessee, under the rule of *Gillespie* v. *Oklahoma,* 257 U. S. 501 (1922), which was itself overruled in *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342 (1949), over two decades after *Shaw.* As a decision with respect to constitutionally mandated intergovernmental immunity, *Shaw* remains good law, although its result was altered by statute, as Congress was free to do. See generally *Board of County Comm'rs* v. *Seber,* 318 U. S. 705 (1943).

> very purposes of their creation, to educate the Indians in responsibility . . . ." *Id.*, at 578–581.

We accordingly decline the invitation to resurrect the expansive version of the intergovernmental-immunity doctrine that has been so consistently rejected in modern times.

II

The Tribe's broad claims of tax immunity must therefore be rejected. But there remains to be considered the scope of the immunity specifically afforded by § 5 of the Indian Reorganization Act. 25 U. S. C. § 465.

A

Section 465 provides, in part, that "any lands or rights acquired" pursuant to any provision of the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." [11] On its face, the statute exempts land and rights in land, not income derived from its use. It is true that a statutory tax exemption for "lands" may, in light of its context and purposes, be construed to support an exemption for taxation on income derived from the land. See *Squire* v. *Capoeman,* 351 U. S. 1 (1956); cf. *Superior Bath House Co.* v. *McCarroll,* 312 U. S. 176 (1941).[12] But, absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.

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[11] The ski resort land was not technically "acquired" "in trust for the Indian tribe." But, as the Solicitor General has pointed out, "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe." Brief for the United States as *amicus curiae* 13. We think the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465. It should perhaps be noted that the Tribe has not suggested that it is immune from taxation by virtue of its status as a lessee of land owned by the Federal Government. See, *e. g., United States* v. *Detroit,* 355 U. S. 466 (1958); *James* v. *Dravo Contracting Co.,* 302 U. S. 134 (1937); cf. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376 (1938); *Oklahoma Tax Comm'n* v. *Texas Co., supra.*

"This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . . If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." *Oklahoma Tax Comm'n* v. *United States,* 319 U. S., at 606–607. See *Squire* v. *Capoeman, supra,* at 6. Absent a "definitely expressed" exemption, an Indian's royalty income from Indian oil lands is subject to the federal income tax although the source of the income may be exempt from tax. *Choteau* v. *Burnet,* 283 U. S. 691, 696–697 (1931).

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[12] *Squire* v. *Capoeman* involved the attempted imposition of federal capital gains taxes on the sale price of timber logged off allotted Indian timberland (located within a reservation). The timber constituted "the major value"—if not the only practical value—of the Indian's allotted land and it was clear that if the capital gains tax was to apply, the purposes and intent of the General Allotment Act of 1887 would in large measure have been frustrated. 351 U. S., at 10. The Court, relying in part on "relatively contemporaneous official and unofficial writings" on the intended scope of the income tax laws, *id.,* at 9, declined to so interpret those later enacted laws and to find that the Government intended to tax its own ward in this particular manner. In contrast to *Squire,* we find nothing fundamentally inconsistent with the intent of the Indian Reorganization Act in permitting the gross receipts of the Tribe's off-reservation enterprise to be subject to nondiscriminatory state taxes.

The Court has also held that a State, as well as the Federal Government, may tax an Indian's pro rata share of income from a tribe's restricted mineral resources. *Leahy* v. *State Treasurer,* 297 U. S. 420 (1936). Lessees of otherwise exempt Indian lands are also subject to state taxation. *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342 (1949).

On the face of § 465, therefore, there is no reason to hold that it forbids income as well as property taxes. Nor does the legislative history support any other conclusion. As we have noted, several explicit provisions encompassing a broad tax immunity for chartered Indian communities were dropped from the bills that preceded the Wheeler-Howard bill. See n. 9, *supra.* Similarly, the predecessor to the exemption embodied in § 465 dealt only with lands acquired for new reservations or for additions to existing reservations. 1934 House Hearings 11. Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by §§ 476 and 477 of the Act.[13] These provisions were designed to encourage tribal enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732. In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in § 465 does not encompass or bar the collection of New Mexico's nondiscriminatory gross receipts tax and that the Tribe's ski resort is subject to that tax.

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[13] It is unclear from the record whether the Tribe has actually incorporated itself as an Indian chartered corporation pursuant to § 477. But see Charters, Constitutions and By-Laws of the Indian Tribes of North America, pt. III, pp. 13–15 (G. Fay ed. 1967). The Tribe's constitution, however, adopted under 25 U. S. C. § 476, gives its Tribal Council the powers that would ordinarily be held by such a corporation, Art. XI, and by both practice and regulations, the two entities have apparently merged in important respects. See 25 CFR § 91.2; Comment, n. 6, *supra,* at 973. In any event, the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business.

B

We reach a different conclusion with respect to the compensating use tax imposed on the personalty installed in the construction of the ski lifts. According to the Stipulation of Facts, that personal property has been "permanently attached to the realty." In view of § 465, these permanent improvements on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax. See *United States* v. *Rickert,* 188 U. S. 432, 441–443 (1903). We think the same immunity extends to the compensating use tax on the property. The jurisdictional basis for use taxes is the use of the property in the State. See *Henneford* v. *Silas Mason Co.,* 300 U. S. 577 (1937); *McLeod* v. *J. E. Dilworth Co.,* 322 U. S. 327, 330 (1944). It has long been recognized that "use" is among the "bundle of privileges that make up property or ownership" of property and, in this sense at least, a tax upon "use" is a tax upon the property itself. *Henneford* v. *Silas Mason Co., supra,* at 582. This is not to say that use taxes are for all purposes to be deemed simple ad valorem property taxes. See, *e. g., United States* v. *Detroit,* 355 U. S. 466 (1958), and its companion cases; *Sullivan* v. *United States,* 395 U. S. 169 (1969). But use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former. "Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements." *United States* v. *Rickert, supra,* at 442.

The judgment of the Court of Appeals is

Affirmed in part and reversed in part.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting in part.

The power of Congress granted by Art. I, § 8 "[t]o regulate Commerce . . . with the Indian Tribes" is an exceedingly broad one. In the liquor cases the Court held that it reached acts even off Indian reservations in areas normally subject to the police power of the States. *Perrin* v. *United States,* 232 U. S. 478. The power gained breadth by reason of historic experiences that induced Congress to treat Indians as wards of the Nation. See *Gritts* v. *Fisher,* 224 U. S. 640, 642-643; *United States* v. *Thomas,* 151 U. S. 577, 585; *United States* v. *McGowan,* 302 U. S. 535, 538. The laws enacted by Congress varied from decade to decade. See U. S. Dept. of the Interior, Federal Indian Law 94-138 (1958), which is a revision of the monumental work, Handbook of Federal Indian Law prepared by Felix S. Cohen and published in 1940.

The present Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.,* was enacted in 1934 with various purposes in mind, the ones most relevant being, first, "[t]o permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations," and second, "[t]o establish a system of financial credit for Indians." S. Rep. No. 1080, 73d Cong., 2d Sess., 1.

Loans had been made by the federal agency to individual Indians, but the experience had not been satisfactory. *Id.,* at 3-4. The 1934 Act precluded such loans and set up a $10 million revolving-credit fund for loans to incorporated tribes. The industry established pursuant to that Act and involved here is a ski enterprise, adjacent to the reservation and located on lands leased from the U. S. Forest Service.

The Court makes much of the fact that the ski enterprise is not on the reservation. But that seems irrelevant to me by reason of § 5 of the Act, which provides in part that "any lands or rights acquired" pursuant to the 1934 Act "shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." 25 U. S. C. § 465. While the lease of Forest Service lands was not technically "acquired . . . in trust for the Indian tribe," the Court concedes that the lease arrangement was sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465. And so the question respecting income taxes comes down to whether these taxes are within the scope of "such lands or rights" as used in § 5.

I start from the premise made explicit in the Senate Report on the 1934 Act. It set forth the endorsement by President Roosevelt of "a new standard of dealing between the Federal Government and its Indian wards." S. Rep., *supra,* at 3. Article 10 of the 1852 Treaty with the Apaches described the role of the guardian as respects these wards: "For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper." 10 Stat. 980.

The 1934 Act obviously is an effort by Congress to extend its control to Indian economic activities outside the reservation for the benefit of its Indian wards. The philosophy permeating the present Act was articulated by Mr. Chief Justice Marshall in *Worcester* v. *Georgia,* 6 Pet. 515, 556:

> "From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate."

As noted in *Warren Trading Post* v. *Tax Comm'n,* 380 U. S. 685, most tax immunities of Indians have related to activities in reservations. But, as we stated in that case, the fact that the activities occurred on a reservation was not the controlling reason, "but rather because Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Id.,* at 691 n. 18.

The powers of Congress "over Indian affairs are as wide as State powers over non-Indians," subject, of course, to the limitations of the Bill of Rights. Federal Indian Law 24. One illustration of its extent is shown by the liquor cases already cited. We deal here, however, with "tribal property"—a leasehold interest in federal lands adjoining the reservation. "The term *tribal property* . . . does not designate a single and definite legal institution, but rather a broad range within which important variations exist." Federal Indian Law 590–591. There is no magic in the word "reservation." *United States* v. *McGowan, supra,* held that land purchased by Congress for a tribe but outside a "reservation" was nonetheless "Indian country." While that case involved application of liquor laws, the Court stated that "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out," *id.*, at 538, and that it was immaterial what the tract of the land was called. *Id.*, at 539.

In the present case, Congress has attempted to give this tribe an economic base which offers job opportunities, a higher standard of living, community stability, preservation of Indian culture, and the orientation of the tribe to commercial maturity. We deal only with a tribal-developed enterprise. State taxation of that enterprise interferes with the federal project. The ski resort, being a federal tool to aid the tribe, may not be taxed by the State without the consent of Congress. Congress by § 5 of the Act has made the "lands or rights" acquired for the tribe exempt from state and local taxation. Section 5, indeed, states that "lands or rights" acquired under the 1934 Act shall be held "in trust for the Indian tribe or individual Indian for which the land is acquired." There is no more convincing way to tax "rights" in land than to impose an income tax on the gross or net income from those rights. If § 5 be thought to be ambiguous, we should resolve the ambiguity in favor of the tribe. As stated in *Carpenter* v. *Shaw,* 280 U. S. 363, 367, "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." In *Squire* v. *Capoeman,* 351 U. S. 1, we resolved doubts respecting the federal income tax in favor of the Indian. There is the same reason for taking that course here.

The tribal ski enterprise, unlike the private entrepreneur in *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, on which the Court relies, is plainly a federal instrumentality—authorized and financed by Congress with the aim of starting the tribe on commercial ventures. This case has no relation to *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, which raised the question whether state inheritance taxes could be levied on restricted property. The Court only held that restricted property, as created by Congress, carried no implication of estate tax exemption. *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342, also relied on by the Court, merely held that a lessee of mineral rights in Indian lands was not immunized from paying state gross production taxes and state excise taxes on petroleum produced from the lands. Those cases would be relevant here if the tribe had leased the ski resort to an outsider who sought the tribal tax immunity. We deal only with an income tax levied on a tribal corporate enterprise conducted by the tribe with federal funds on federal lands leased to the tribe. Federal Indian Law distinguished the *Helvering* and like cases relied on by the Court from an enterprise "organized solely to carry out governmental objectives, such as the tribal corporations organized" under the 1934 Act with which we now deal, *id.,* at 852–853.

In my view, this state income tax is barred by § 5 through which Congress has given tax immunity to these new tribal enterprises.

McCLANAHAN *v.* ARIZONA STATE TAX COMMISSION

APPEAL FROM THE COURT OF APPEALS OF ARIZONA

No. 71-834. Argued December 12, 1972—Decided March 27, 1973

The State of Arizona has no jurisdiction to impose a tax on the income of Navajo Indians residing on the Navajo Reservation and whose income is wholly derived from reservation sources, as is clear from the relevant treaty with the Navajos and federal statutes. Pp. 167–181.

14 Ariz. App. 452, 484 P. 2d 221, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Richard B. Collins argued the cause for appellant. With him on the briefs were *Donald Juneau* and *Theodore R. Mitchell.*

James D. Winter, Assistant Attorney General of Arizona, argued the cause for appellee. With him on the brief was *Gary K. Nelson,* Attorney General.

Harry R. Sachse argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Frizzell, Deputy Solicitor General Wallace, Edmund B. Clarke,* and *Carl Strass.**

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*Briefs of *amici curiae* urging reversal were filed by *Charles A. Hobbs* for the National Congress of American Indians; by *David H. Getches* for the Native American Rights Fund; and by *Samuel W. Murphy, Jr.,* and *William C. Pelster* for Montana Inter-Tribal Policy Board.

William D. Dexter, Assistant Attorney General of Washington, and *Eugene F. Corrigan* filed a brief for Multistate Tax Commission as *amicus curiae* urging affirmance.

Mr. Hobbs, Pierre J. LaForce, and *R. Don Mahan* filed a brief for the Estate of Rose Mason as *amicus curiae.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case requires us once again to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations. In this instance, the problem arises in the context of Arizona's efforts to impose its personal income tax on a reservation Indian whose entire income derives from reservation sources. Although we have repeatedly addressed the question of state taxation of reservation Indians,[1] the problems posed by a state income tax are apparently of first impression in this Court.[2] The Arizona courts have held that such state taxation is permissible. 14 Ariz. App. 452, 484 P. 2d 221 (1971). We noted probable jurisdiction, 406 U. S. 916 (1972), and now reverse. We hold that by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves. The tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources.

I

Appellant is an enrolled member of the Navajo tribe who lives on that portion of the Navajo Reservation located within the State of Arizona. Her complaint alleges that all her income earned during 1967 was derived from within the Navajo Reservation. Pursuant to Ariz. Rev. Stat. Ann. § 43–188 (f) (Supp. 1972–1973), $16.20 was withheld from her wages for that year to cover her state income tax liability.[3] At the conclusion of the tax year, appellant filed a protest against the collection of any taxes on her income and a claim for a refund of the entire amount withheld from her wages. When no action was taken on her claim, she instituted this action in Arizona Superior Court on behalf of herself and those similarly situated, demanding a return of the money withheld and a declaration that the state tax was unlawful as applied to reservation Indians.

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[1] See, *e. g., Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598 (1943); *Childers* v. *Beaver,* 270 U. S. 555 (1926); *United States* v. *Rickert,* 188 U. S. 432 (1903); *The Kansas Indians,* 5 Wall. 737 (1867). Cf. *Squire* v. *Capoeman,* 351 U. S. 1 (1956).

[2] State courts have disagreed on the question. Compare *Ghahate* v. *Bureau of Revenue,* 80 N. M. 98, 451 P. 2d 1002 (1969), with *Commissioner of Taxation* v. *Brun,* 286 Minn. 43, 174 N. W. 2d 120 (1970). See *Powless* v. *State Tax Comm'n,* 22 App. Div. 2d 746, 253 N. Y. S. 2d 438 (1964); *State Tax Comm'n* v. *Barnes,* 14 Misc. 2d 311, 178 N. Y. S. 2d 932 (1958).

The trial court dismissed the action for failure to state a claim, and the Arizona Court of Appeals affirmed. Citing this Court's decision in *Williams* v. *Lee,* 358 U. S. 217 (1959), the Court of Appeals held that the test "is not whether the Arizona state income tax infringes on plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo tribe of Indians to be self-governing." 14 Ariz. App., at 454, 484 P. 2d, at 223. The court thus distinguished cases dealing with state taxes on Indian real property on the ground that these taxes, unlike the personal income tax, infringed tribal autonomy.

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[3] The liability was created by Ariz. Rev. Stat. Ann. § 43–102 (a) (Supp. 1972–1973) which, in relevant part, provides: "There shall be levied, collected, and paid for each taxable year upon the entire net income of every estate or trust taxable under this title and of every resident of this state and upon the entire net income of every nonresident which is derived from sources within this state, taxes in the following amounts and at the following rates upon the amount of net income in excess of credits against net income provided in §§ 43–127 and 43–128." Appellant conceded below that she was a "resident" within the meaning of the statute, and that question, which in any event poses an issue of state law, is not now before us.

The court then pointed to cases holding that state employees could be required to pay federal income taxes and that the State had a concomitant right to tax federal employees. See *Helvering* v. *Gerhardt,* 304 U. S. 405 (1938); *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466 (1939). Reasoning by analogy from these cases, the court argued that Arizona's income tax on individual Navajo Indians did not "[cause] an impairment of the right of the Navajo tribe to be self governing." 14 Ariz. App., at 455, 484 P. 2d, at 224.

Nor did the court find anything in the Arizona Enabling Act, 36 Stat. 557, to prevent the State from taxing reservation Indians. That Act, the relevant language of which is duplicated in the Arizona Constitution, disclaims state title over Indian lands and requires that such lands shall remain "under the absolute jurisdiction and control of the Congress of the United States." 36 Stat. 569. But the Arizona court, relying on this Court's decision in *Organized Village of Kake* v. *Egan,* 369 U. S. 60 (1962), held that the Enabling Act nonetheless permitted concurrent state jurisdiction so long as tribal self-government remained intact. Since an individual income tax did not interfere with tribal self-government, it followed that appellant had failed to state a claim. The Arizona Supreme Court denied a petition for review of this decision, and the case came here on appeal. See 28 U. S. C. § 1257 (2).

II

It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See, *e. g., Organized Village of Kake* v. *Egan, supra; Metlakatla Indian Community* v. *Egan,* 369 U. S. 45 (1962); *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598 (1943). Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. See, *e. g., Thomas* v. *Gay,* 169 U. S. 264 (1898); *Utah & Northern R. Co.* v. *Fisher,* 116 U. S. 28 (1885). Cf. *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 651 (1930). Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands. See, *e. g., Mescalero Apache Tribe* v. *Jones, ante,* p. 145. Rather, this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation.

The principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson,* 324 U. S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries. "The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States." *Id.*, at 561. See also *United States* v. *Kagama,* 118 U. S. 375 (1886); *Ex parte Crow Dog,* 109 U. S. 556 (1883).

Although *Worcester* on its facts dealt with a State's efforts to extend its criminal jurisdiction to reservation lands,[4] the rationale of the case plainly extended to state taxation within the reservation as well. Thus, in *The Kansas Indians,* 5 Wall. 737 (1867), the Court unambiguously rejected state efforts to impose a land tax on reservation Indians. "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority." *Id.,* at 755. See also *The New York Indians,* 5 Wall. 761 (1867).

It is true, as the State asserts, that some of the later Indian tax cases turn, not on the Indian sovereignty doctrine, but on whether or not the State can be said to have imposed a forbidden tax on a federal instrumentality. See, *e. g., Leahy* v. *State Treasurer of Oklahoma,* 297 U. S. 420 (1936); *United States* v. *Rickert,* 188 U. S. 432 (1903). To the extent that the tax exemption rests on federal immunity from state taxation, it may well be inapplicable in a case such as this involving an individual income tax.[5] But it would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation, may not extend. Thus, only a few years ago, this Court struck down Arizona's attempt to tax the proceeds of a trading company doing business within the confines of the very reservation involved in this case. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S. 685 (1965). The tax in no way interfered with federal land or with the National Government's proprietary interests. But it was invalidated nonetheless because "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference." *Id.,* at 686–687.[6] As a leading text on Indian problems summarizes the relevant law: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." U. S. Dept. of the Interior, Federal Indian Law 845 (1958) (hereafter Federal Indian Law).

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[4] See also *Williams* v. *United States,* 327 U. S. 711 (1946); *United States* v. *Chavez,* 290 U. S. 357 (1933); *United States* v. *Ramsey,* 271 U. S. 467 (1926).

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[5] The federal-instrumentality doctrine does not prohibit state taxation of individuals deriving their income from federal sources. See *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466 (1939). Cf. *Leahy* v. *State Treasurer of Oklahoma,* 297 U. S. 420 (1936). The doctrine has, in any event, been sharply limited with respect to Indians. See *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598 (1943).

[6] The court below distinguished *Warren Trading Post* as limited to cases where the Federal Government has pre-empted state law by regulating Indian traders in a manner inconsistent with state taxation. 14 Ariz. App. 452, 455, 484 P. 2d 221, 224. But although the Court was, no doubt, influenced by the federal licensing requirements, the reasoning of *Warren Trading Post* cannot be so restricted. The Court invalidated Arizona's tax in part because "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S. 685, 690 (1965).

This is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static during the 141 years since *Worcester* was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. As noted above, the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See, *e. g., Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598 (1943). Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. See, *e. g., New York ex rel. Ray* v. *Martin,* 326 U. S. 496 (1946); *Draper* v. *United States,* 164 U. S. 240 (1896); *Utah & Northern R. Co.* v. *Fisher,* 116 U. S. 28 (1885). This line of cases was summarized in this Court's landmark decision in *Williams* v. *Lee,* 358 U. S. 217 (1959): "Over the years this Court has modified [the *Worcester* principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . . Thus, suits by Indians against outsiders in state courts have been sanctioned. . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. . . . But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. . . . Essentially, absent governing

Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.*, at 219–220 (footnote omitted).

Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.[7] See *Mescalero Apache Tribe* v. *Jones, ante,* p. 145. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, *e. g., United States* v. *Kagama,* 118 U. S. 375 (1886), with *Kennerly* v. *District Court,* 400 U. S. 423 (1971).[8]

The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens.[9] They have the right to vote,[10] to use state courts,[11] and they receive some state services.[12] But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *United States* v. *Kagama,* 118 U. S., at 381–382.

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[7] The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. See U. S. Const. Art. I, § 8, cl. 3; Art. II, § 2, cl. 2. See also *Williams* v. *Lee,* 358 U. S. 217, 219 n. 4 (1959); *Perrin* v. *United States,* 232 U. S. 478, 482 (1914); Federal Indian Law 3.

[8] The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. Cf. *Organized Village of Kake* v. *Egan,* 369 U. S. 60, 62 (1962); Federal Indian Law 846. The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

III

When the relevant treaty and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant. The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo Nation in 1868. The agreement provided, in relevant part, that a prescribed reservation would be set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat. 668.

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[9] See 8 U. S. C. § 1401 (a)(2).

[10] See, *e. g., Harrison* v. *Laveen,* 67 Ariz. 337, 196 P. 2d 456 (1948).

[11] See, *e. g., Felix* v. *Patrick,* 145 U. S. 317, 332 (1892).

[12] The court below pointed out that Arizona was expending tax monies for education and welfare within the confines of the Navajo Reservation. 14 Ariz. App., at 456–457, 484 P. 2d, at 225–226. It should be noted, however, that the Federal Government defrays 80% of Arizona's ordinary social security payments to reservation Indians, see 25 U. S. C. § 639, and has authorized the expenditure of more than $88 million for rehabilitation programs for Navajos and Hopis living on reservations. See also 25 U. S. C. §§ 13, 309, 309a. Moreover, "[c]onferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization." *The Kansas Indians,* 5 Wall., at 757.

The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions. We have had occasion in the past to describe the circumstances under which the agreement was reached. "At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country." *Williams* v. *Lee,* 358 U. S., at 221.

It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw,* 280 U. S. 363, 367 (1930). When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S., at 687, 690; *Williams* v. *Lee, supra,* at 221–222.

Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation.[13] Thus, when Arizona entered the Union, its entry was expressly conditioned on the promise that the State would "forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Arizona Enabling Act, 36 Stat. 569.[14]

Nor is the Arizona Enabling Act silent on the specific question of tax immunity. The Act expressly provides that "nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property *outside of an Indian reservation* owned or held by any Indian." *Id.*, at 570 (emphasis added). It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous than this as providing a tax exemption for Indians. See, *e. g.*, *Squire* v. *Capoeman*, 351 U. S. 1, 6 (1956), and we see no reason to give this language an especially crabbed or restrictive meaning.[15]

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[13] "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. . . . Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* has denied." *Williams* v. *Lee,* 358 U. S., at 220–221 (footnote omitted).

[14] This language is duplicated in Arizona's own constitution. See Ariz. Const., Art. 20, ¶ 4. It is also contained in the Enabling Acts of New Mexico and Utah, the other States in which the Navajo Reservation is located. See New Mexico Enabling Act, 36 Stat. 558–559; Utah Enabling Act, 28 Stat. 108.

Indeed, Congress' intent to maintain the tax-exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U. S. C. § 105 *et seq.*, which provides comprehensive federal guidance for state taxation of those living within federal areas. Section 106 (a) of Title 4 U. S. C. grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that "[n]othing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." To be sure, the language of the statute itself does not make clear whether the reference to "any Indian not otherwise taxed" was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 4 (1940); 84 Cong. Rec. 10685, and this Court has so interpreted it. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S., at 691 n. 18. While the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization.[16]

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[15] There is nothing in *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962), to the contrary. In *Egan*, we held that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction," and that this language in federal legislation did not preclude the exercise of residual state authority. See *id.*, at 68. But that holding came in the context of a decision concerning the fishing rights of *non-reservation* Indians. See *id.*, at 62. It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians.

Finally, it should be noted that Congress has now provided a method whereby States may assume jurisdiction over reservation Indians. Title 25 U. S. C. § 1322 (a) grants the consent of the United States to States wishing to assume criminal and civil jurisdiction over reservation Indians, and 25 U. S. C. § 1324 confers upon the States the right to disregard enabling acts which limit their authority over such Indians. But the Act expressly provides that the State must act "with the consent of the tribe occupying the particular Indian country," 25 U. S. C. § 1322 (a),[17] and must "appropriately [amend its] constitution or statutes." 25 U. S. C. § 1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See *Kennerly* v. *District Court,* 400 U. S. 423 (1971).[18]

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[16] See, *e. g.,* 25 U. S. C. § 398 (congressional authorization for States to tax mineral production on unallotted tribal lands). Cf. 18 U. S. C. § 1161 (state liquor laws may be applicable within reservations); 25 U. S. C. § 231 (state health and education laws may be applicable within reservations).

[17] As passed in 1953, Pub. L. 280, 67 Stat. 588, delegated civil and criminal jurisdiction over Indian reservations to certain States, although not to Arizona. 18 U. S. C. § 1162; 28 U. S. C. § 1360. The original Act also provided a means whereby other States could assume jurisdiction over Indian reservations without the consent of

Arizona, of course, has neither amended its constitution to permit taxation of the Navajos nor secured the consent of the Indians affected. Indeed, a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U. S. C. § 1322 (a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. See Brief for Appellee 24–26.[19] But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected. Cf. Tr. of Oral Arg. 38–39. Unless the State is willing to defend the position

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the tribe affected. 67 Stat. 590. However, in 1968, Congress passed the Indian Civil Rights Act which changed the prior procedure to require the consent of the Indians involved before a State was permitted to assume jurisdiction. 25 U. S. C. § 1322 (a). Thus, had it wished to do so, Arizona could have unilaterally assumed jurisdiction over its portion of the Navajo Reservation at any point during the 15 years between 1953 and 1968. But although the State did pass narrow legislation purporting to require the enforcement of air and water pollution standards within reservations, Ariz. Rev. Stat. Ann. §§ 36–1801, 36–1865 (Supp. 1972), it declined to assume full responsibility for the Indians during the period when it had the opportunity to do so.

[18] We do not suggest that Arizona would necessarily be empowered to impose this tax had it followed the procedures outlined in 25 U. S. C. § 1322 *et seq.* Cf. 25 U. S. C. § 1322 (b). That question is not presently before us, and we express no views on it.

[19] In light of our prior cases, appellee has no choice but to make this concession. See, *e. g., Kennerly* v. *District Court,* 400 U. S. 423 (1971); *States* v. *Kagama,* 118 U. S. 375 (1886).

that it may constitutionally administer its tax system altogether without judicial intervention, cf. *Ward* v. *Board of County Comm'rs,* 253 U. S. 17 (1920), the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case.

IV

When Arizona's contentions are measured against these statutory imperatives, they are simply untenable. The State relies primarily upon language in *Williams* v. *Lee* stating that the test for determining the validity of state action is "whether [it] infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 220. Since Arizona has attempted to tax individual Indians and not the tribe or reservation as such, it argues that it has not infringed on Indian rights of self-government.

In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination. But even if the State's premise were accepted, we reject the suggestion that the *Williams* test was meant to apply in this situation. It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. See also *Organized Village of Kake* v. *Egan,* 369 U. S., at 75–76. In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.[20] On the contrary, this Court expressly rejected such a position only two years ago.[21] In *Kennerly* v. *District Court,* 400 U. S. 423 (1971), the Blackfoot Indian Tribe had voted to make state jurisdiction concurrent within the reservation. Although the State had not complied with the procedural prerequisites for the assumption of jurisdiction, it argued that it was nonetheless entitled to extend its laws to the reservation since such action was obviously consistent with the wishes of the Tribe and, therefore, with tribal self-government. But we held that the *Williams* rule was inapplicable and that "[t]he unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction." *Id.,* at 427. If Montana may not assume jurisdiction over the Blackfeet by simple legislation even when the Tribe itself agrees to be bound by state law, it surely follows that Arizona may not assume such jurisdiction in the absence of tribal agreement.

Nor is the State's attempted distinction between taxes on land and on income availing. Indeed, it is somewhat surprising that the State adheres to this distinction in light of our decision in *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra,* wherein we invalidated an *income* tax which Arizona had attempted to impose within the Navajo Reservation. However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.

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[20] *Organized Village of Kake* v. *Egan,* 369 U. S. 60 (1962), is not such a case. See n. 15, *supra.*

[21] Indeed, the position was expressly rejected in *Williams* itself, upon which appellee so heavily relies. *Williams* held that "*absent governing Acts of Congress,* the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 220 (emphasis added).

Finally, we cannot accept the notion that it is irrelevant "whether the . . . state income tax infringes on [appellant's] rights as an individual Navajo Indian," as the State Court of Appeals maintained. 14 Ariz. App., at 454, 484 P. 2d, at 223. To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that "the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them." *Williams* v. *Lee, supra,* at 220 (emphasis added). In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose. Accordingly, the judgment of the court below must be

Reversed.

BUTZ, SECRETARY OF AGRICULTURE, ET AL. *v.* GLOVER LIVESTOCK COMMISSION CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1545. Argued February 27, 1973—Decided March 28, 1973

Respondent stockyard operator, who after a hearing had been found to have short-weighted livestock and underpaid consignors on the basis of the false weights, was ordered by a Judicial Officer acting for the Secretary of Agriculture to cease and desist and to keep correct records, and its registration under the Packers and Stockyards Act was suspended for 20 days. The Court of Appeals upheld all but the suspension, which it found inappropriate in view of the other sanctions, and contrary to the Secretary's practice except for "intentional and flagrant" violations. *Held:* In setting aside the suspension order, the Court of Appeals exceeded the scope of proper judicial review of administrative sanctions, since the Secretary had full authority to make the suspension order as a deterrent to violations whether intentional or negligent, and issuance of the order against respondent, who had ignored previous warnings against short-weighting, was not an abuse of administrative discretion. Pp. 185-189.

454 F. 2d 109, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 189.

Keith A. Jones argued the cause for petitioners. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wood, Morton Hollander,* and *William Kanter.*

R. A. Eilbott, Jr., argued the cause for respondent. With him on the brief was *Edward I. Staten.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Judicial Officer of the Department of Agriculture, acting for the Secretary of Agriculture, found that respondent, a registrant under the Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C. § 181 *et seq.*, wilfully violated §§ 307 (a) and 312 (a) of the Act, 7 U. S. C. §§ 208 (a) and 213 (a), by incorrect weighing of livestock, and also breached § 401, 7 U. S. C. § 221, by entries of false weights. An order was entered directing that respondent cease and desist from the violations and keep correct accounts, and also suspending respondent as a registrant under the Act for 20 days. Upon review of the decision and order, the Court of Appeals for the Eighth Circuit upheld, as supported by substantial evidence, the findings that respondent violated the Act by short-weighting cattle, and also sustained the cease-and-desist order and the order to keep correct accounts. The Court of Appeals, however, set aside the 20-day suspension. 454 F. 2d 109 (1972). We granted certiorari to consider whether, in doing so, the Court of Appeals exceeded the scope of proper judicial review of administrative sanctions. 409 U. S. 947 (1972). We conclude that the setting aside of the suspension was an impermissible judicial intrusion into the administrative domain under the circumstances of this case, and reverse.

Respondent operates a stockyard in Pine Bluff, Arkansas. As a registered "market agency" under § 303 of the Act, 7 U. S. C. § 203, respondent is authorized to sell consigned livestock on commission, subject to the regulatory provisions of the Act and the Secretary's implementing regulations.[1] Investigations of respondent's operations in 1964, 1966, and 1967 uncovered instances of underweighing of consigned livestock. Respondent was informally warned to correct the situation, but when a 1969 investigation revealed more underweighing, the present proceeding was instituted by the Administrator of the Packers and Stockyards Administration.

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[1] 7 U. S. C. §§ 201–217a. Specifically, registrants are prohibited from engaging in or using "any unfair, unjustly discriminatory, or

Following a hearing and the submission of briefs, the Department of Agriculture hearing examiner found that respondent had "intentionally weighed the livestock at less than their true weights, issued scale tickets and accountings to the consignors on the basis of the false weights, and paid the consignors on the basis of the false weights."[2] The hearing examiner recommended, in addition to a cease-and-desist order and an order to keep correct records, a 30-day suspension of respondent's registration under the Act.

The matter was then referred to the Judicial Officer. After hearing oral argument, the Judicial Officer filed a decision and order accepting the hearing examiner's findings and adopting his recommendations of a cease-and-desist order and an order to keep correct records. The recommended suspension was also imposed but was reduced to 20 days. The Judicial Officer stated:

> "It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and desist order but also a suspension of respondent

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deceptive practice or device in connection with . . . receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling . . . of livestock," 7 U. S. C. § 213 (a), and are required to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business . . . ." 7 U. S. C. § 221.

The Secretary's regulations may be found in 9 CFR pt. 201.

[2] App. 35.

> as a registrant under the act but for a lesser period than recommended by complainant and the hearing examiner." 30 Agri. Dec. 179, 186 (1971).

The Court of Appeals agreed that 7 U. S. C. § 204 authorized the Secretary to suspend "any registrant found in violation of the Act," 454 F. 2d, at 113, that the suspension procedure here satisfied the relevant requirements of the Administrative Procedure Act, 5 U. S. C. § 558, and that "the evidence indicates that [respondent] acted with careless disregard of the statutory requirements and thus meets the test of 'wilfulness.'" 454 F. 2d, at 115. The court nevertheless concluded that the suspension order was "unconscionable" under the circumstances of this case. The court gave two reasons. The first, relying on four previous suspension decisions, was that the Secretary's practice was not to impose suspensions for negligent or careless violations but only for violations found to be "intentional and flagrant," and therefore that the suspension in respondent's case was contrary to a policy of "'achiev[ing] . . . uniformity of sanctions for similar violations.'" The second reason given was that "[t]he cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate." *Id.,* at 114, 115.

The applicable standard of judicial review in such cases required review of the Secretary's order according to the "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co.* v. *SEC,* 329 U. S. 90, 112 (1946). Thus, the Secretary's choice of sanction was not to be overturned unless the Court of Appeals might find it "unwarranted in law or . . . without justification in fact . . . ." *Id.*, at 112–113; *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194 (1941); *Moog Industries, Inc.* v. *FTC*, 355 U. S. 411, 413–414 (1958); *FTC* v. *Universal-Rundle Corp.*, 387 U. S. 244, 250 (1967); 4 K. Davis, Administrative Law § 30.10, pp. 250–251 (1958). The Court of Appeals acknowledged this definition of the permissible scope of judicial review[3] but apparently regarded respondent's suspension as "unwarranted in law" or "without justification in fact." We cannot agree that the Secretary's action can be faulted in either respect on this record.

We read the Court of Appeals' opinion to suggest that the sanction was "unwarranted in law" because "uniformity of sanctions for similar violations" is somehow mandated by the Act. We search in vain for that requirement in the statute.[4] The Secretary may suspend

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[3] The Court of Appeals stated:

"Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere. . . . [A]ppellate courts [may not] enter the more spacious domain of public policy which Congress has entrusted in the various regulatory agencies." 454 F. 2d 109, 114.

[4] The Court of Appeals cited a 1962 decision by the Secretary in which appears a reference to "uniformity of sanctions for similar violations." *In re Silver*, 21 Agri. Dec. 1438 (1962). That reference is no support for the Court of Appeals' decision, however, for the Secretary said expressly in that decision:

"False and incorrect weighing of livestock by registrants under the act is a flagrant and serious violation thereof . . ." and "even if respondent did not give instructions for the false weighings, *his negligence in allowing the false weighings over an extended period brings such situation within the reach of the cited cases* [sustaining sanctions] *and we would still order the sanctions below.*" *Id.*, at 1452 (emphasis added).

"for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U. S. C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent. *Hyatt* v. *United States,* 276 F. 2d 308, 313 (CA10 1960); *G. H. Miller & Co.* v. *United States,* 260 F. 2d 286 (CA7 1958); *In re Silver,* 21 Agri. Dec. 1438, 1452 (1962).[5] The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *FCC* v. *WOKO,* 329 U. S. 223, 227–228 (1946); *FTC* v. *Universal-Rundle Corp.,* 387 U. S., at 250, 251; *G. H. Miller & Co.* v. *United States, supra,* at 296; *Hiller* v. *SEC,* 429 F. 2d 856, 858–859 (CA2 1970); *Dlugash* v. *SEC,* 373 F. 2d 107, 110 (CA2 1967); *Kent* v. *Hardin,* 425 F. 2d 1346, 1349 (CA5 1970).

Moreover, the Court of Appeals may have been in error in acting on the premise that the Secretary's practice was to impose suspensions only in cases of "intentional and flagrant conduct."[6] The Secretary's practice, rather, apparently is to employ that sanction as in his judgment best serves to deter violations and achieve the objectives of that statute. Congress plainly intended in its broad grant to give the Secretary that breadth of discretion. Therefore, mere unevenness in the application of the sanction does not render its application in a particular case "unwarranted in law."

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[5] It is by no means clear that respondent's violations were merely negligent. The hearing examiner found that respondent had "intentionally" underweighed livestock, and the Judicial Officer stated: "We conclude then, as did the hearing examiner, that respondent *wilfully* violated . . . the act." (Emphasis added.) "Wilfully" could refer to either intentional conduct or conduct that was merely careless or negligent. It seems clear, however, that the Judicial Officer sustained the hearing examiner's finding that the violations were "intentional."

[6] See, *e. g., In re Martella,* 30 Agri. Dec. 1479 (1971); *In re Meggs,* 30 Agri. Dec. 1314 (1971); *In re Producers Livestock Mar-*

Nor can we perceive any basis on this record for a conclusion that the suspension of respondent was so "without justification in fact" "as to constitute an abuse of [the Secretary's] discretion." *American Powcr Co.* v. *SEC,* 329 U. S., at 115; *Moog Industries, Inc.* v. *FTC,* 355 U. S., at 414; *Barsky* v. *Board of Regents,* 347 U. S. 442, 455 (1954). The Judicial Officer rested the suspension on his view of its necessity in light of respondent's disregard of previous warnings. The facts found concerning the previous warnings and respondent's disregard of these warnings were sustained by the Court of Appeals as based on ample evidence. In that circumstance, the overturning of the suspension authorized by the statute was an impermissible intrusion into the administrative domain.

Similarly, insofar as the Court of Appeals rested its action on its view that, in light of damaging publicity about the charges, the cease-and-desist order sufficiently redressed respondent's violations, the court clearly exceeded its function of judicial review. The fashioning of an appropriate and reasonable remedy is for the

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keting Assn., 30 Agri. Dec. 796 (1971); *In re Trimble,* 29 Agri. Dec. 936 (1970); *In re Anson,* 28 Agri. Dec. 1127 (1969); *In re Williamstown Stockyards,* 27 Agri. Dec. 252 (1968); *In re Middle Georgia Livestock Sales Co.,* 23 Agri. Dec. 1361 (1964). These cases involve suspension of registrants under the Packers and Stockyards Act for false weighing of producers' livestock and in none was there a finding that the violation was intentional or flagrant. There are also many cases of suspension for diverse other violations without a finding that the conduct was intentional or flagrant. See, *e. g., In re Wallis,* 29 Agri. Dec. 37 (1970).

Secretary, not the court. The court may decide only whether, under the pertinent statute and relevant facts, the Secretary made "an allowable judgment in [his] choice of the remedy." *Jacob Siegel Co.* v. *FTC,* 327 U. S. 608, 612 (1946).

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the respondent. Why certiorari was granted is a mystery to me—particularly at a time when the Court is thought by many to be burdened by too heavy a caseload. See Rule 19, Rules of the Supreme Court of the United States.

The Court of Appeals did nothing more than review a penalty imposed by the Secretary of Agriculture that was alleged by the respondent to be discriminatory and arbitrary. In approaching its task, the appellate court displayed an impeccable understanding of the permissible scope of review:

> "The scope of our review is limited to the correction of errors of law and to an examination of the sufficiency of the evidence supporting the factual conclusions. The findings and order of the Judicial Officer must be sustained if not contrary to law and if supported by substantial evidence. Also, this Court may not substitute its judgment for that of the Judicial Officer's as to which of the various inferences may be drawn from the evidence." 454 F. 2d 109, 110–111.
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> . . . . .

> "Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere." *Id.*, at 114.

Had the Court of Appeals used the talismanic language of the Administrative Procedure Act, and found the penalty to be either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706 (2)(A), I have no doubt that certiorari would have been denied. But the Court of Appeals made the mistake of using the wrong words, saying that the penalty was "unconscionable," because it was "unwarranted and without justification in fact." [1]

Today the Court holds that the penalty was not "unwarranted in law," because it was within permissible statutory limits. But this ignores the valid principle of law that motivated the Court of Appeals—the principle that like cases are to be treated alike. As Professor Jaffe has put the matter:

> "The scope of judicial review is ultimately conditioned and determined by the major proposition that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. . . . An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The

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[1] The Court of Appeals borrowed this phrasing of the test from this Court's opinion in *American Power Co.* v. *SEC*, 329 U. S. 90, 112–113.

> very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution."[2]

The reversal today of a wholly defensible Court of Appeals judgment accomplishes two unfortunate results. First, the Court moves administrative decisionmaking one step closer to unreviewability, an odd result at a time when serious concern is being expressed about the fairness of agency justice.[3] Second, the Court serves notice upon the federal judiciary to be wary indeed of venturing to correct administrative arbitrariness.

Because I think the Court of Appeals followed the correct principles of judicial review of administrative conduct, I would affirm its judgment.

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[2] L. Jaffe, Judicial Control of Administrative Action 589–590 (1965).

[3] See generally K. Davis, Discretionary Justice: A Preliminary Inquiry (1969), reviewed by Wright, Beyond Discretionary Justice, 81 Yale L. J. 575.

LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 71-1470. Argued November 8, 1972—Decided April 2, 1973

Following this Court's invalidation in *Lemon* v. *Kurtzman,* 403 U. S. 602 (*Lemon I*) of Pennsylvania's statutory program to reimburse nonpublic sectarian schools (hereafter schools) for secular educational services, the District Court on remand enjoined any payments under the program for services rendered after *Lemon I,* but permitted Pennsylvania to reimburse the schools for services performed prior to that decision. Appellants challenge the scope of this decree. *Held:* The judgment is affirmed. Pp. 193-209.

348 F. Supp. 300, affirmed.

THE CHIEF JUSTICE, in an opinion joined by MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST concluded that the District Court did not abuse its discretion in permitting Pennsylvania to reimburse the schools for services rendered and costs incurred in reliance on the statutory scheme prior to its invalidation in *Lemon I.* Pp. 197-209.

(a) An unconstitutional statute is not absolutely void, but is a practical reality upon which people rely. Courts recognize that reality. Pp. 197-199.

(b) A trial court has wide latitude in shaping an equitable decree and reaching an accommodation between public and private needs. Pp. 200-201.

(c) The contested reimbursement will not contravene the constitutional principle of *Lemon I* of avoiding the ongoing entanglement of church and state, since only a final, ministerial post-audit is involved and no further detailed state surveillance of the schools is required. At the same time, however, supervision already conducted by Pennsylvania officials insures that the proposed reimbursement will not be used for sectarian purposes. The proposed payment reflects only the schools' expenses incurred in expectation of reimbursement. Pp. 201-202.

(d) The schools relied in good faith on the state statute, which invited the contracts and authorized reimbursement for past services; and appellants, in self-styled "sensible recognition of the practical realities of the situation," may well have encouraged such reliance by the schools by not moving to have the payments enjoined before the contract services had been performed. Pp. 203–205.

(e) The schools could not have anticipated the *Lemon I* holding, which involved resolution of an issue of first impression that "was not clearly foreshadowed." Pp. 206–207.

(f) A State and those with whom it deals are not to be subjected to harsh, retrospective relief merely because they act on the basis of presumptively valid legislation, in the absence of contrary judicial direction. Pp. 207–209.

MR. JUSTICE WHITE concurred in the judgment.

BURGER, C. J., announced the judgment of the Court and an opinion in which BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., concurred in the judgment. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and STEWART, JJ., joined, *post*, p. 209. MARSHALL, J., took no part in the consideration or decision of the case.

David P. Bruton argued the cause for appellants. With him on the briefs were *Melvin L. Wulf, Sanford J. Rosen*, and *Franklin C. Salisbury*.

William B. Ball argued the cause for appellees. With him on the brief for appellee Commonwealth of Pennsylvania were *J. Shane Creamer*, Attorney General, *Samuel Rappaport, Joseph G. Skelly, James E. Gallagher, Jr., C. Clark Hodgson, Jr.*, and *William D. Valente*. *Henry T. Reath* filed a brief for appellee Pennsylvania Association of Independent Schools.

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and an opinion in which MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join.

On June 28, 1971, we held that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. The case was remanded to the three-judge District Court for further proceedings consistent with our opinion. *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971) (*Lemon I*). On remand, the District Court entered summary judgment in favor of appellants and enjoined payment, under Act 109, of any state funds to nonpublic sectarian schools for educational services performed after June 28, 1971. The District Court's order permitted the State to reimburse nonpublic sectarian schools for services provided before our decision in *Lemon I.* Appellants made no claim that appellees refund all sums paid under the Pennsylvania statute[1] struck down in *Lemon I.*

Appellants, the successful plaintiffs of *Lemon I,* now challenge the limited scope of the District Court's injunction. Specifically, they assert that the District Court erred in refusing to enjoin payment of some $24 million set aside by Pennsylvania to compensate nonpublic sectarian schools for educational services rendered by them during the 1970–1971 school year. We noted probable jurisdiction, 406 U. S. 943 (1972), and we affirm the judgment of the District Court.

(1)

The specifics of the Pennsylvania statutory scheme held unconstitutional in *Lemon I* need be recalled only briefly. Under Act 109, the participating nonpublic schools of Pennsylvania were to be reimbursed by the State for certain educational services provided by the schools pursuant to purchase-of-service contracts with the State. According to the terms of the contracts, the schools were to provide teachers, textbooks, and instructional materials for mathematics, modern foreign language, physical science, and physical education courses—"secular" courses of instruction. The State was not only to compensate the schools for the services provided, but also to undertake continuing surveillance of the instructional programs to insure that the services purchased were not provided in connection with "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." See *Lemon I, supra,* at 609–610.

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[1] Nonpublic Elementary and Secondary Education Act, June 19, 1968, No. 109, Pa. Stat. Ann., Tit. 24, §§ 5601–5609 (Supp. 1971).

Under § 5607 of the Act, any nonpublic school seeking reimbursement was to "maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement." To this end, the school accounts were to be subject to audit by the State Auditor General. Actual payment was to be made by the Superintendent of Public Instruction "in four equal installments payable on the first day of September, December, March and June of the school term *following* the school term in which the secular educational service was rendered." (Emphasis supplied.)

In *Lemon I,* we held that, although Act 109 had a secular legislative purpose, the Act fostered "excessive entanglement" of church schools and State through the requirement of ongoing state scrutiny of the educational programs of sectarian schools, the statutory post-audit procedures, and potential involvement in the political process. We found it unnecessary to decide whether Act 109 was constitutionally infirm on the additional ground that the "primary effect" of any state payments to church-related schools would be to promote the cause of religion in contravention of the Establishment Clause of the First Amendment.

(2)

Against this backdrop, we turn to the events relevant to this appeal. On June 19, 1968, Act 109 became law. Approximately one month later, appellants publicly declared their intention of challenging the constitutionality of the new legislation. During the following six months, the State took steps to implement the Act, promulgating regulations and, in January 1969, entering for the first time into service contracts for the 1968–1969 school year (then in progress) with approximately 1,181 nonpublic schools throughout Pennsylvania. The schools submitted schedules in June 1969, at the conclusion of the 1968–1969 school year, specifying the precise items of expense during that year for which they would seek reimbursement, to be made during the 1969–1970 school year. On June 3, 1969, appellants filed their complaint, asking that Act 109 be declared unconstitutional and its enforcement enjoined.

Simultaneously with their 1969 complaint, appellants filed a motion for a preliminary injunction to restrain the responsible state officials from "paying or processing for paying any funds pursuant to [Act 109]." However, appellants abandoned the request for preliminary relief in a letter of August 28, 1969, from their counsel to Judge Troutman. Appellants, describing their position as a "sensible recognition of the practical realities of the situation, . . . withdrew from any attempt to prevent initial payment to the nonpublic schools scheduled for September 2 [1969]." In the same letter, appellants' counsel mentioned the payments scheduled for December 2, 1969, but in fact no attempt was ever made to enjoin those reimbursements.

On November 29, 1969, a divided District Court granted appellees' motion to dismiss appellants' complaint for failure to state a claim on which relief could be granted. Appellants filed a notice of appeal to this Court on December 17, 1969; at no time before or after probable jurisdiction was noted on April 20, 1970, did appellants move for interlocutory relief pending appeal, even though on January 15, 1970, the schools entered into service contracts with the State for the 1969–1970 school year.

Consequently, the District Court had no occasion to consider the exercise of injunctive power *pendente lite.*

In September 1970, the schools began performing services for the 1970–1971 school year, compensable under the terms of Act 109; and on January 15, 1971, contracts were entered into for that school year. On June 28, 1971, we held Act 109 unconstitutional and remanded the cause to the District Court for further proceedings consistent with our opinion. Not until appellants filed their motion for summary judgment, in August 1971, did they first indicate their intention to prevent reimbursement under Act 109 for the services already provided by the schools during the 1970–1971 school year.

(3)

Claims that a particular holding of the Court should be applied retroactively have been pressed on us frequently in recent years. Most often, we have been called upon to decide whether a decision defining new constitutional rights of a defendant in a criminal case should be applied to convictions of others that predated the new constitutional development. *E. g., Robinson* v. *Neil,* 409 U. S. 505 (1973); *Adams* v. *Illinois,* 405 U. S. 278 (1972); *Desist* v. *United States,* 394 U. S. 244 (1969); *Stovall* v. *Denno,* 388 U. S. 293 (1967); *Johnson* v. *New Jersey,* 384 U. S. 719 (1966); *Tehan* v. *Shott,* 382 U. S. 406 (1966); *Linkletter* v. *Walker,* 381 U. S. 618 (1965). But "in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases." *Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 106 (1971); *Hanover Shoe* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968); *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964); *England* v. *State Board of Medical Examiners,* 375 U. S. 411 (1964). We have approved nonretroactive relief in civil litigation, relating, for example, to the validity of municipal financing founded upon electoral procedures later declared unconstitutional, *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), and *City of Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970); or to the validity of elections for local officials held under possibly discriminatory voting laws, *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969). In each of these cases, the common request was that we should reach back to disturb or to attach legal consequence to patterns of conduct premised either on unlawful statutes or on a different understanding of the controlling judge-made law from the rule that ultimately prevailed.

Appellants urge, as they did in the District Court, a strange amalgam of flexibility and absolutism. Appellants assure us that they do not seek to require the schools to disgorge prior payments received under Act 109; in the same breath, appellants insist that the presently disputed payment be enjoined because an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County,* 118 U. S. 425, 442 (1886). Conceding that we have receded from *Norton* in a host of criminal decisions and in other recent constitutional decisions relating to municipal bonds, appellants nevertheless view those precedents as departures from the established norm of *Norton.* We disagree.

The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal . . . ." *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371, 374 (1940). Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.'" *Linkletter, supra,* at 627, quoting from *Chicot County Drainage Dist., supra,* at 374. However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity. Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none.

In *Linkletter,* the Court suggested a test, often repeated since, embodying the recent balancing approach; we looked to "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.,* at 629. Those guidelines are helpful, see *infra,* at 201–203, but the problem of *Linkletter* and its progeny is not precisely the same as that now before us. Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judgments of conviction obtained under a prior standard; the problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. True, the temporal scope of the injunction has brought the parties back to this Court, and their dispute calls into play values not unlike those underlying *Linkletter* and its progeny. But however we state the issue, the fact remains that we are asked to re-examine the District Court's evaluation of the proper means of implementing an equitable decree. Cf. *United States* v. *Estate of Donnelly,* 397 U. S. 286, 295 (1970); *id.,* at 296–297 (Harlan, J., concurring).

In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15, 27 n. 10 (1971). Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary,[2] what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education,* 349 U. S. 294, 300 (1955). MR. JUSTICE DOUGLAS, speaking for the Court, has said,

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made

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[2] In *Linkletter* v. *Walker,* 381 U. S. 618, 629 (1965), the Court recalled Mr. Justice Cardozo's statement that "the federal constitution has no voice upon the subject," citing *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 364 (1932). In *Sunburst,* the Court refused to accept the petitioner's contention that "[a]dherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is . . . a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future." *Id.,* at 363–364. Instead, the Court held that

> "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Id.,* at 364.

Sunburst does not, of course, suggest that we may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court.

> equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329–330 (1944).

See also *Holmberg* v. *Armbrecht,* 327 U. S. 392, 396 (1946).

In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots.

(4)

The constitutional fulcrum of *Lemon I* was the excessive entanglement of church and state fostered by Act 109. We found it unnecessary to decide whether the "legislative precautions [of Act 109] restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses." 403 U. S., at 613–614. For, as we said of both Act 109 and the similar Rhode Island provision, "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed . . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.,* at 619. We further emphasized the reciprocal threat to First Amendment interests from enmeshing the divisive issue of direct aid to religious schools in the traditional political processes. *Id.,* at 622–624.

The sensitive values of the Religion Clauses do not readily lend themselves to quantification but, despite the inescapable imprecision, we think it clear that the proposed distribution of state funds to Pennsylvania's nonpublic sectarian schools will not substantially undermine the constitutional interests at stake in *Lemon I.* Act 109 required the Superintendent of Public Instruction to ensure that educational services to be reimbursed by the State were kept free of religious influences. Under the Act, the Superintendent's supervisory task was to have been completed long ago, during the 1970–1971 school year itself; nothing in the record suggests that the Superintendent did not faithfully execute his duties according to law. Hence, payment of the present disputed sums will compel no further state oversight of the instructional processes of sectarian schools. By the same token, since the constitutionality of Act 109 is now settled, there is no further potential for divisive political conflict among the citizens and legislators of Pennsylvania over the desirability or degree of direct state aid to sectarian schools under Act 109.

Two problems having constitutional overtones remain, but their resolution requires no compromise of the basic principles of *Lemon I.* There is, first, the impact of the single and final post-audit. The record indicates that the post-audit process will involve only a ministerial "cleanup" function, that of balancing expenditures and receipts in the closing accounting—undertaken only once, and in that setting a minimal contact of the State with the affairs of the schools. Second, there is the question of impinging on the Religion Clauses from the fact of *any* payment that provides any state assistance or aid to sectarian schools—the issue we did not reach in *Lemon I.* Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur. There is no present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes.[3] Finally, as will appear, even this single proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971.

Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools.[4] It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy. *City of Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969). That there was such reliance by the schools is reflected by a well-supported District Court finding. The District Court found that there was no dispute "that to deny the church-related schools any reimbursement for their services rendered would impose upon them a substantial burden which would be difficult for them to meet."[5] 348 F. Supp. 300, 304–305.

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[3] See *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971):

"If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension." *Id.,* at 640 (DOUGLAS, J., concurring).

"The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence." *Id.,* at 668 (opinion of WHITE, J.).

Here, the "insoluble paradox" is avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into our present evaluation of the constitutional interests at stake in the proposed payment.

[4] We agree with the District Court that whether the payments in question constitute payments under valid contracts or a subsidy "makes no difference in our decision." To characterize the payments as subsidies does not "lessen the reliance of the nonpublic schools on the payments or the subsequent hardship upon them if the payments are not made." 348 F. Supp. 300, 304 n. 6.

The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109. In June 1969, appellants initiated the litigation that culminated in *Lemon I*. Though initially appellants moved for a preliminary injunction to block the September 1969 payment of funds for services rendered during the 1968–1969 school year, for reasons of their own appellants withdrew the request. Funds were paid in September and December 1969, and in March and June 1970. In 1970, the State entered into new contracts with the nonpublic schools; appellants took no steps to block the making of these contracts or to prevent the State from disbursing funds, in September and December 1970, or March and June 1971, for services rendered during the 1969–1970 school year. Appellants, meanwhile, had filed a notice of appeal to this Court by the time the distribution of funds for the 1969–1970 school year began. It was only after our decision in *Lemon I*—six months after the contracts for the 1970–1971 school year were perfected and after all services under those contracts had been performed—that appellants asserted their intention to block the payments due, beginning in the fall of 1971. Thus, for nearly two years, the State and the schools proceeded to act on the assumption that appellants would continue to adhere to a "sensible recognition of the practical realities of the situation."

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[5] The District Court's comment, in turn, reflects the following colloquy between that court and counsel for appellants, at the December 15, 1971, hearing after remand from this Court:

"MR. SAWYER: I am perfectly willing to concede—and I think I must here; we have taken no evidence—that there was reliance. And I would like to state, so there is no question about that, that I am assuming there was reliance. I think as a practical matter, however, the schools continued to do what they were doing before.

"JUDGE HASTIE: Reliance in the sense, I assume, of determining activities and expenditures in anticipation that this amount would be reimbursed?

"MR. SAWYER: I know of a school that escrowed it, but I would think that would be rare. And I have to live with that, I think, unless I want to be prepared to go ahead and ask to take testimony and try to prove that wasn't so. . . ."

There has been no demonstration by the appellee schools of the precise amount of any detriment incurred by them during the 1970–1971 school year in the expectation of reimbursement by the State. The complexity of such a determination for each of Pennsylvania's 1,181 nonpublic schools that contracted with the State under Act 109 is readily apparent.[6] But we need not dwell on the matter of uncertainty. On this record the District Court could reasonably find reliance on the part of the appellee schools and reasonably could conclude that no more was needed to demonstrate retrospectively the degree of their reliance.

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[6] As to each school, the determination of actual reliance would be subtle, premised largely on credibility and not on facts of record. Nonreliance could not be assumed simply because expenditure levels remained constant before and after Act 109; any school might well assert that it would have reduced its educational expenditures in some particular but for the expectation of compensation for certain other expenditures incurred in connection with Act 109. Similarly, the inquiry could not be limited to expenditures for those items specified by the Act. Increased expenditures for any of the gamut of a school's activities might have been incurred in reliance on reimbursement for services covered by Act 109.

It is argued, though, that the schools were foolhardy to rely on any reimbursement by the State whatever, in view of the constitutional cloud over the Pennsylvania program from the outset. We conclude, however, that our holding in *Lemon I* "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson,* 404 U. S., at 106. A three-judge district court, with one dissent, upheld Act 109. Soon after, another three-judge district court in Rhode Island held unconstitutional the Rhode Island statutory scheme we considered together with Pennsylvania's program in *Lemon I.* Nor were district courts alone in disagreement over the constitutionality of *Lemon*-style plans to provide financial assistance to sectarian schools. This Court was itself divided when the issue was ultimately resolved after full briefing and argument. And the Court acknowledged "that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon I,* 403 U. S., at 612.[7]

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[7] According to the dissent, appellees can "tender no considerations of equity" because they had "clear warning" that they were "treading on unconstitutional ground." The apparent premise for this assertion is the view that the Establishment Clause forbids any and all use of tax moneys to "support" or to "subsidize" sectarian schools. Yet the Court's decisions, prior to and at the time of *Lemon I,* shied away from this sweeping application of the Establishment Clause, favoring instead particularized analysis of state involvement in religious schools, with the analysis based upon the facts and circumstances before us. *Tilton* v. *Richardson,* 403 U. S. 672 (1971);

That there would be constitutional attack on Act 109 was plain from the outset. But this is not a case where it could be said that appellees acted in bad faith or that they relied on a plainly unlawful statute. In this case, even the clarity of hindsight is not persuasive that the constitutional resolution of *Lemon I* could be predicted with assurance sufficient to undermine appellees' reliance on Act 109.

(5)

In the end, then, appellants' position comes down to this: that any reliance whatever by the schools was unjustified because Act 109 was an "untested" state statute whose validity had never been authoritatively determined. The short answer to this argument is that governments must act if they are to fulfill their high responsibilities. As one scholar has observed, the diverse state governments were preserved by the Framers "as separate sources of authority and organs of administration—a point on which they hardly had a choice." H. Wechsler, Principles, Politics, and Fundamental Law 50 (1961).

Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position

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Walz v. *Tax Comm'n,* 397 U. S. 664, 669 (1970); *Board of Education* v. *Allen,* 392 U. S. 236, 242–243 (1968); *Everson* v. *Board of Education,* 330 U. S. 1, 14 (1947). There is, then, no basis for the dissent's suggestion that the Court has been "unequivocal" in proscribing all state assistance to religious schools.

could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers—the officers of Pennsylvania—have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on "one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio School District* v. *Rodriguez, ante,* p. 1, at 60 (1973) (STEWART, J., concurring).

Federalism suggests that federal court intervention in state judicial processes be appropriately confined. See *Younger* v. *Harris,* 401 U. S. 37 (1971), and companion cases. Likewise, federalism requires that federal injunctions unrelated to state courts be shaped with concern and care for the responsibilities of the executive and legislative branches of state governments.[8] In short, the propriety of the relief afforded appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.

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[8] This is not to say, of course, that the flexible range of federal injunctive powers should be curtailed so as to permit state officers to proceed with their business regardless of serious constitutional questions concerning state legislation. Indeed, a significant purpose of these tools is to preserve rights of all parties and to minimize unnecessary harm during the often protracted pendency of constitutional litigation.

Affirmed.

MR. JUSTICE WHITE concurs in the judgment.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involves last year, the current year, or next year. Madison in his Remonstrance stated: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment . . . ."[1]

Whether the grant is for teaching last year or at the present time, taxpayers are forced to contribute to sectarian schools a part of their tax dollars.

The ban on that practice is not new. *Lemon I,* 403 U. S. 602, did not announce a change in the law. We had announced over and over again that the use of taxpayers' money to support parochial schools violates the First Amendment, made applicable to the States by virtue of the Fourteenth.

We said in unequivocal words in *Everson* v. *Board of Education,* 330 U. S. 1, 16: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We reiterated the same idea in *Zorach* v. *Clauson*, 343 U. S. 306, 314, in *McGowan* v. *Maryland*, 366 U. S. 420, 443, and in *Torcaso* v. *Watkins*, 367 U. S. 488, 493. We repeated the same idea in *McCollum* v. *Board of Education*, 333 U. S. 203, 210, and added that a State's tax-supported public schools could not be used "for the dissemination of religious doctrines" nor could a State provide the church "pupils for their religious classes through use of the State's compulsory public school machinery." *Id.*, at 212.

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[1] Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901). The Remonstrance is reprinted in *Everson* v. *Board of Education,* 330 U. S. 1, 63 (Rutledge, J., dissenting), and in *Walz* v. *Tax Comm'n,* 397 U. S. 664, 719 (DOUGLAS, J., dissenting).

MR. JUSTICE BRENNAN in his separate opinion in *Lemon I* put the matter succinctly when he said,

> "[F]or more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions." 403 U. S. 642, 648–649.

So there was clear warning that those who proposed such subsidies were treading on unconstitutional ground. They can tender no considerations of equity that should allow them to profit from their unconstitutional venture.

The issues presented in this type of case are often caught up in political strategies, designed to turn judicial or legislative minorities into majorities. Lawyers planning trial strategies are familiar with those tactics. But those who use them and lose have no equities that make constitutional what has long been declared to be unconstitutional. From the days of Madison, the issue of subsidy has never been a question of the amount of the subsidy but rather a principle of no subsidy at all.

The problem of retroactivity involved in criminal cases is therefore inapplicable. There the question is whether the newly announced rule goes to the fairness of the trial that had been completed under the old rule. See *Johnson* v. *New Jersey,* 384 U. S. 719, 726–729. Here there is no new rule supplanting an old rule. The rule of no subsidy has been the dominant one since the days of Madison. We deal with the normal situation that governs judicial decisions. Normally they determine legal rights and obligations with respect to events that have already transpired. By definition, courts decide disputes that have already arisen. A losing litigant has no equity in the fact that he "relied" on advice that turned out to be unreliable or wrong.[2] A decision overruling a prior authority may at times deny a litigant due process if applied retroactively. See *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673. Only a compelling circumstance has been held to limit a judicial ruling to prospective applications. The disruptive effect in criminal law enforcement is one example. *Stovall* v. *Denno,* 388 U. S. 293, 300. Likewise, a ruling on the legality of municipal bonds has been given only prospective application where many prior bonds had been issued in good faith on a contrary assumption. *City of Phoenix* v. *Kolodziejski,* 399 U. S. 204, 213–215.

Retroactivity of the decision in *Lemon I* goes to the very core of the integrity of the judicial process. Constitutional principles do not ride on the effervescent arguments advanced by those seeking to obtain unconstitutional subsidies. The happenstance of litigation is no criterion for dispensing these unconstitutional subsidies. No matter the words used for the apologia, the subsidy today given to sectarian schools out of taxpayers' monies exceeds by far the "three pence" which Madison condemned in his Remonstrance.

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[2] The rule of *Bruton* v. *United States,* 391 U. S. 123, which rejected *Delli Paoli* v. *United States,* 352 U. S. 232, was given retrospective effect. We said, "The element of reliance is not persuasive, for *Delli Paoli* has been under attack from its inception and many courts have in fact rejected it." *Roberts* v. *Russell,* 392 U. S. 293, 295.

I would reverse the judgment below and adhere to the constitutional principle announced in *Lemon I*.

FONTAINE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-6757. Argued February 28, 1973—Decided April 2, 1973

On the record in this case, petitioner, who made an uncounseled guilty plea in open court and was sentenced to prison, may collaterally attack the plea and is entitled to an evidentiary hearing under 28 U. S. C. § 2255 since his motion under that provision set out detailed factual allegations, in part documented by records, supporting his claim that the plea was coerced, and since it cannot be said that the record before the District Court "conclusively showed" that petitioner was entitled to no relief.

Vacated and remanded.

Steven M. Umin, by appointment of the Court, 409 U. S. 1005, argued the cause and filed a brief for petitioner.

Samuel Huntington argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen,* and *Philip R. Monahan.*

PER CURIAM.

On November 13, 1969, the petitioner was arraigned in a federal district court upon a charge of robbery of a federally insured bank.[1] He executed a written waiver of his right to counsel and to a grand jury indictment, and pleaded guilty. Before accepting the plea, the trial judge, proceeding under Fed. Rule Crim. Proc. 11, addressed the petitioner personally. The petitioner acknowledged in substance that his plea was given voluntarily and knowingly, that he understood the nature of the charge and the consequences of the plea, and that he was in fact guilty. See *McCarthy* v. *United States*, 394 U. S. 459, 464–467; cf. *Boykin* v. *Alabama*, 395 U. S. 238, 242. The judge then accepted the guilty plea and subsequently sentenced the petitioner to 20 years in prison.

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[1] He had been arrested by state officers and had been in the custody of state police and in state jurisdiction until the time of the federal charge.

On August 6, 1971, the petitioner filed a motion under 28 U. S. C. § 2255 to vacate his sentence on the ground that his plea of guilty had been induced by a combination of fear, coercive police tactics, and illness, including mental illness. The District Judge who had accepted the petitioner's plea and sentenced him to prison considered the motion but denied it without an evidentiary hearing; the District Judge reasoned that since the requirements of Rule 11 had been met, this collateral attack was *per se* unavailable, stating: "When the trial court has so questioned the accused about pleading guilty, the petitioner cannot now be heard to collaterally attack the record and deny what was said in open court." The Court of Appeals for the Sixth Circuit affirmed on the same grounds.

Petitioner seeks certiorari to review that judgment; he urges that under the plain wording of § 2255 and our decision in *Machibroda* v. *United States*, 368 U. S. 487, he was entitled to an evidentiary hearing on his claims. Petitioner's motion for relief under § 2255 sets out detailed factual allegations regarding alleged circumstances occurring after his arrest and before his appearance in court. Those allegations describe physical abuse and illness from a recent gunshot wound that required hospitalization which was documented by records tendered in support of his petition. The records also showed that a month following the plea he was again hospitalized for heroin addiction, for aggravation of the earlier gunshot wound and for other severe illnesses. Petitioner further alleges that prolonged interrogation continued during the period preceding his plea. All of this, he claims, coerced his confession, his waiver of counsel, and the uncounseled plea of guilty. It is elementary that a coerced plea is open to collateral attack. *Machibroda* v. *United States, supra,* at 493. See also *Waley* v. *Johnston,* 316 U. S. 101; *Walker* v. *Johnston,* 312 U. S. 275; *Diamond* v. *United States,* 432 F. 2d 35, 39; *Crow* v. *United States,* 397 F. 2d 284, 285-286. It is equally clear that § 2255 calls for a hearing on such allegations unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ."

We need not take issue with the Government's generalization that when a defendant expressly represents in open court, without counsel, that his plea is voluntary and that he waived counsel voluntarily, he "may not ordinarily" repudiate his statements to the sentencing judge. The objective of Fed. Rule Crim. Proc. 11, of course, is to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations.[2]

On this record, we cannot conclude with the assurance required by the statutory standard "conclusively show" that under no circumstances could the petitioner establish facts warranting relief under § 2255; accordingly, we vacate the judgment of the Court of Appeals and remand to that court to the end that the petitioner be afforded a hearing on his petition in the District Court.

It is so ordered.

MR. JUSTICE WHITE dissents.

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[2] The petitioner has also urged in this Court that his plea must be vacated because the transcript of his pleading fails to disclose an intelligent waiver of counsel. But this claim was not raised in the Court of Appeals or in the petition for certiorari, and we accordingly express no view upon the question.

UNITED STATES *v.* INDRELUNAS

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-805. Decided April 16, 1973

The provision in Fed. Rule Civ. Proc. 58, that "[e]very judgment" of a district court "shall be set forth on a separate document" which, *inter alia,* starts the time limits for appeals and post-trial motions running, is a mechanical provision that must be mechanically applied to render certain the date on which a judgment is entered.

Certiorari granted; 465 F. 2d 163, reversed and remanded.

PER CURIAM.

The Government, petitioner here, appealed to the Court of Appeals from a judgment in favor of respondent entered by the District Court on February 25, 1971. The Court of Appeals dismissed the appeal, holding that final judgment had been entered in the action prior to February 25, 1971, and that therefore the Government's appeal was untimely under the provisions of Fed. Rule App. Proc. 4. *Foiles* v. *United States,* 465 F. 2d 163 (CA7 1972). Since both parties implicitly concede that the jurisdiction of the Court of Appeals was based on the provisions of 28 U. S. C. § 1291, making final decisions of the district courts appealable, the correctness of the Court of Appeals' decision depends on whether the District Court's judgment of February 25, 1971, was a final decision.[1] That question, in turn, depends on whether actions taken in the District Court previous to the February date amounted to the "entry of judgment" as that term is used in Fed. Rule Civ. Proc. 58.[2]

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[1] Fed. Rule Civ. Proc. 54 (a) provides in part that "'[j]udgment' as used in these rules includes a decree and any order from which an appeal lies."

Rule 58 provides in pertinent part that "[e]very judgment shall be set forth on a separate document." There was admittedly no such separate document filed in the District Court in this case prior to the February date, but the Court of Appeals held that the "separate document" requirement of Rule 58 was applicable only to those judgments described in clause (2) of the first sentence of the Rule, and that since the relief granted by the District Court in this action was not within the description contained in that clause, a "separate document" was not essential to the existence of a judgment. The Court of Appeals stated in its opinion that its holding was contrary to holdings of the Courts of Appeals for the Third, Fifth, and Tenth Circuits, respectively. 465 F. 2d, at 167.[3] A conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered. Consideration of the petition for certiorari and the response has led us to conclude that further briefs and oral arguments would not materially assist in our disposition of the case and, for the reasons hereafter stated, we grant certiorari and reverse the judgment of the Court of Appeals.

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[2] Rule 58 provides:

"Subject to the provisions of Rule 54 (b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79 (a). Entry of the judgment shall not be delayed for taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course."

[3] See *Levin* v. *Wear-Ever Aluminum,* 427 F. 2d 847 (CA3 1970); *Pure Oil Co.* v. *Boyne,* 370 F. 2d 121 (CA5 1966); *United States* v. *Evans,* 365 F. 2d 95 (CA10 1966). The decision may also

The underlying dispute between the Government and respondent related to the latter's liability to pay withholding taxes due from a corporation in which he was an officer. Respondent and one Foiles, a fellow corporate officer, were assessed for the unpaid taxes, made partial payments on the assessments, and then unsuccessfully pursued administrative remedies seeking a refund. At the conclusion of these efforts Foiles sued in the District Court for a refund. The Government answered, counterclaimed against Foiles for the balance due on the assessment, and filed a third-party complaint seeking like recovery against respondent. Issue was joined, trial had to a jury, and verdicts in the following form were returned in favor of both taxpayers:

> "We, the jury, find for the plaintiff, Harry H. Foiles, and against the defendant, United States of America, in the amount claimed. . . .
>
> "We, the jury, find against the defendant, United States of America, on the counterclaim, and in favor of the plaintiff, Harry H. Foiles. . . .
>
> "We, the jury, find against the third-party plaintiff, United States of America, and in favor of the third-party defendant, Alphonse T. Indrelunas."

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conflict with a recent Fourth Circuit case. *Superior Life Insurance Co.* v. *United States,* 462 F. 2d 945 (CA4 1972).

The District Court's civil docket entry following the recital of these forms of verdict contains the language "Enter judgment on the verdicts. Jury discharged."

There was apparently no agreement as to the exact amount respondent and Foiles were to receive pursuant to the jury's verdict at the time it was returned. On May 14, 1970, some 14 months later, a stipulation was filed in the District Court specifying the amount of refund to be paid to each of the prevailing parties. Within 60 days of this date, the Government filed a notice of appeal as to Foiles only, but this appeal was not pursued. Some eight months later, on motion by the Government, the District Court on February 25, 1971, entered formal judgments, the one in favor of respondent being in the amount of $3,621.32 against the Government. The Government's notice of appeal was from this judgment.

The Court of Appeals, in holding the Government's notice of appeal untimely, decided that judgment had been actually entered on March 21, 1969, when the District Court clerk entered in the civil docket the notations described above. It held that the "separate document" requirement contained in Rule 58 applies only to the "complex" judgments described in clause (2) of that Rule. The court said that:

> "[W]hen the jury verdict is clear and unequivocal, setting forth a general verdict with reference to the sole question of liability and where nothing remains to be decided and when no opinion or memorandum is written, as is the situation described in clause (1) of Rule 58, there is no requirement for a separate document to start the time limits for appeal running." 465 F. 2d, at 167–168.

Rule 58 was substantially amended in 1963 to remove uncertainties as to when a judgment is entered and to expedite the entry of judgment by limiting the number of situations in which the court need rely on counsel for the prevailing party to prepare a form of judgment. The first sentence of the rule describes "simple" judgments, providing for recovery of only a sum certain, of costs, or of nothing. These clause (1) judgments are to be prepared, signed, and entered by the clerk without direction by the court. Clause (2) of that sentence deals with the more "complex" forms of judgment, which are to be entered by the clerk after the court approves the form of the judgment. The rule then continues that "[e]very judgment shall be set forth on a separate document," and further states that "[a] judgment is effective only when so set forth and when entered as provided in Rule 79 (a)."

The reason for the "separate document" provision is clear from the notes of the advisory committee of the 1963 amendment. See Notes of Advisory Committee following Fed. Rule Civ. Proc. 58, reported in 28 U. S. C. Prior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. See, *e. g., United States* v. *F. & M. Schaefer Brewing Co.,* 356 U. S. 227 (1958). To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.

Professor Moore makes the following cogent observation with respect to the purpose of the separate-document provision of the rule:

> "This represents a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective,

> which has a most important bearing, *inter alia,* on the time for appeal and the making of post-judgment motions that go to the finality of the judgment for purposes of appeal." 6A J. Moore, Federal Practice ¶ 58.04 [4.-2], at 58-161 (1972).

Again in the same work, the author notes:

> "Although confusion may still arise at times, the current version of Rule 58 provides a greater degree of certainty as to when a judgment has been rendered and becomes effective. Thus, as previously pointed out, when the court's decision, whether written or oral, is a simple grant of a sum certain or costs or that all relief be denied, the clerk is to prepare forthwith and sign a judgment which must be set forth on a separate document. Thereafter, the clerk is immediately to enter the judgment in the civil docket." *Id.,* at 58-180.

Here there was nothing meeting the requirement of the "separate document" provision of Rule 58 until February 25, 1971. The docket entry following the jury's verdict simply reflected the jury's determination as to the liability of the parties, without specifying an amount due; more importantly, notwithstanding the instructions of the court, it was not recorded on a separate document.

The Court of Appeals appears to have been motivated in its conclusion, at least in part, by what it felt to have been the capricious conduct of the Government in first seeking to appeal following the filing of the stipulation for damages, and then later insisting that at that time there had been no judgment which it could have appealed from. But whatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case-by-case tailoring of the "separate document" provision of Rule 58 is one of them. That provision is, as Professor

Moore states, a "mechanical change" that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered.

We grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand for further proceedings consistent with this opinion.

It is so ordered.

BROWN ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-6193. Argued December 7, 1972—Decided April 17, 1973

Petitioners were convicted of transporting and conspiring to transport stolen goods in interstate commerce to their coconspirator, whose retail store was searched under a defective warrant while petitioners were in custody in another State. The charges against petitioners were limited to acts committed before the day of the search. At a pretrial hearing on petitioners' motion to suppress evidence seized at the store, petitioners alleged no proprietary or possessory interest in the store or the goods, and the District Court denied their motion for lack of standing. At petitioners' trial, the seized goods were introduced into evidence. In addition, police testimony as to statements by petitioners implicating each other were introduced into evidence in a manner contrary to *Bruton* v. *United States,* 391 U. S. 123. The Court of Appeals concluded that the *Bruton* error was harmless in view of overwhelming independent proof of guilt and affirmed the District Court's ruling on standing. *Held:*

1. Petitioners had no standing to contest the admission of the evidence seized under the defective warrant since they alleged no legitimate expectation of privacy or interest of any kind in the premises searched or the goods seized; they had no "automatic" standing under *Jones* v. *United States,* 362 U. S. 257, as the case against them did not depend on possession of the seized evidence at the time of the contested search and seizure; and they could not vicariously assert the personal Fourth Amendment right of the store owner in contesting admission of the seized goods. Pp. 227-230.

2. The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury, and the *Bruton* error was harmless. Pp. 230-232.

452 F. 2d 868, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Lowell W. Lundy argued the cause and filed a brief for petitioners.

Mark L. Evans argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Deputy Solicitor General Lacovara, William Bradford Reynolds,* and *Roger A. Pauley.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners were convicted by a jury of transporting stolen goods and of conspiracy to transport stolen goods in interstate commerce, contrary to 18 U. S. C. § 2314 and 18 U. S. C. § 371. The central issue now is whether petitioners have standing to challenge the lawfulness of the seizure of merchandise stolen by them but stored in the premises of one Knuckles, a coconspirator. At the time of the seizure from Knuckles, petitioners were in police custody in a different State. Knuckles successfully challenged the introduction of the stolen goods seized from his store under a faulty warrant, and his case was separately tried.

The evidence against petitioners is largely uncontroverted. Petitioner Brown was the manager of a warehouse in Cincinnati, Ohio, owned by a wholesale clothing and household goods company. He was entrusted with the warehouse keys. Petitioner Smith was a truck driver for the company. During 1968 and 1969, the company had experienced losses attributed to pilferage amounting to approximately $60,000 each year. One West, a buyer and supervisor for the company, recovered a slip of paper he had seen drop from Brown's pocket. On the slip, in Brown's handwriting, was a list of warehouse merchandise, together with a price on each item that was well below wholesale cost. West estimated that the lowest legitimate wholesale price for these items would have been a total of about $6,400, while the total as priced by Brown's list was $2,200. The police were promptly notified and set up a surveillance of the warehouse. Ten days later, petitioners were observed wheeling carts containing boxes of merchandise from the warehouse to a truck. From a concealed point, the police took 20 photographs of petitioners loading the merchandise onto the truck. Petitioners then locked the warehouse, and drove off. They were followed and stopped by the police, placed under arrest, advised of their constitutional rights, and, with the loaded truck, taken into custody to police headquarters. The goods in the truck had not been lawfully taken from the warehouse and had a total value of about $6,500.

Following their arrest, and after being fully informed of their constitutional rights, both petitioners made separate confessions to police indicating that they had conspired with Knuckles to steal from the warehouse, that they had stolen goods from the warehouse in the past, and that they had taken these goods, on two occasions about two months before their arrest, to Knuckles' store in Manchester, Kentucky. Petitioners also indicated that they had "sold" the previously stolen goods on delivery to Knuckles for various amounts of cash. Knuckles' store was then searched pursuant to a warrant, and goods stolen from the company, worth over $100,000 in retail value, were discovered. Knuckles was at the store during the search, but petitioners were in custody in Ohio.

Prior to trial, petitioners and Knuckles[1] moved to suppress the stolen merchandise found at Knuckles' store. The prosecution conceded that the warrant for the search of Knuckles' store was defective. The District Court held a hearing on petitioners' motion to suppress the evidence. Petitioners, however, alleged no proprietary or possessory interest in Knuckles' premises or in the goods seized there, nor was any evidence of such an interest presented to the District Court. After the hearing, the District Court granted Knuckles' motion to suppress the goods seized, but denied petitioners' motion for lack of standing. The charges against Knuckles were severed for separate trial.

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[1] Knuckles was joined in the conspiracy count and was also charged with having received stolen merchandise, contrary to 18 U. S. C. § 2315.

At petitioners' trial, stolen merchandise seized from Knuckles' store was received in evidence. The events leading to petitioners' arrests upon leaving the warehouse and while they were in possession of stolen goods were fully described by police officers who were eyewitnesses. The 20 photographs taken of the crime in progress were admitted into evidence. There was additional incriminating testimony by the owner of the service station from whom petitioners rented trucks used in the thefts, and by five witnesses who saw petitioners unloading boxes from a truck late at night and carrying the boxes into Knuckles' store. The prosecutor also introduced into evidence, over petitioners' objections, portions of each petitioner's confession which implicated the other in a manner now conceded to be contrary to *Bruton* v. *United States,* 391 U. S. 123 (1968). Those considerable parts of each petitioner's confession which did not implicate the other were admitted without objection. The jury returned verdicts of guilty on all counts.

On appeal, the Court of Appeals for the Sixth Circuit recognized that a *Bruton* error had occurred, but went on to conclude that the independent proof of petitioners' guilt was "so overwhelming that the error was harmless," citing *Harrington* v. *California,* 395 U. S. 250 (1969). The Court of Appeals also held that the stolen merchandise seized pursuant to the defective warrant was properly admitted against petitioners, stating:

> "This ruling [of the District Court] was correct because appellants claimed no possessory or proprietary

> rights in the goods or in Knuckles' store, and it is clear that they cannot assert the Fourth Amendment right of another." 452 F. 2d 868, 870 (1971).

(1)

Petitioners contend that they have "automatic" standing to challenge the search and seizure at Knuckles' store. They rely on the decision of this Court in *Jones* v. *United States,* 362 U. S. 257 (1960), establishing a rule of "automatic" standing to contest an allegedly illegal search where the same possession needed to establish standing is "an essential element of the offense . . . charged." *Simmons* v. *United States,* 390 U. S. 377, 390 (1968). That case involved (a) a seizure of contraband narcotics, (b) a defendant who was present at the seizure,[2] and (c) an offense in which the defendant's possession of the seized narcotics at the time of the contested search and seizure was a critical part of the Government's case. *Jones, supra,* at 263. Mr. Justice Frankfurter, writing for the Court in *Jones,* emphasized the "dilemma" inherent in a defendant's need to allege "possession" to contest a seizure, when such admission of possession could later be used against him. *Id.,* at 262–264. Mr. Justice Frankfurter quoted the words of Judge Learned Hand:

> "Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they

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[2] Presence of the defendant at the search and seizure was held, in *Jones,* to be a sufficient source of standing in itself. *Jones* v. *United States,* 362 U. S. 257, 267 (1960). Here, of course, petitioners were not present at the contested search and seizure, but were in police custody in a different State. See *Wong Sun* v. *United States,* 371 U. S. 471, 492 n. 18 (1963).

> must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma." *Connolly* v. *Medalie,* 58 F. 2d 629, 630 (CA2 1932).

The self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution. Subsequent to *Jones,* in *Simmons* v. *United States, supra,* we held that a prosecutor may not use against a defendant at trial any testimony given by that defendant at a pretrial hearing to establish standing to move to suppress evidence. 390 U. S., at 389–394. For example, under the *Simmons* doctrine the defendant is permitted to establish the requisite standing by claiming "possession" of incriminating evidence. If he is granted standing on the basis of such evidence, he may then nonetheless press for its exclusion; but, whether he succeeds or fails to suppress the evidence, his testimony on that score is not directly admissible against him in the trial. Thus, petitioners in this case could have asserted, at the pretrial suppression hearing, a possessory interest in the goods at Knuckles' store without any danger of incriminating themselves. They did not do so.

But it is not necessary for us now to determine whether our decision in *Simmons, supra,* makes *Jones'* "automatic" standing unnecessary. We reserve that question for a case where possession at the time of the contested search and seizure is "an essential element of the offense . . . charged." *Simmons,* 390 U. S., at 390. Here, unlike *Jones,* the Government's case against petitioners does not depend on petitioners' possession of the seized evidence at the time of the contested search and seizure.[3]

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[3] "Petitioner's conviction flows from his possession of the narcotics *at the time of the search.*" *Jones, supra,* at 263 (emphasis added).

The stolen goods seized had been transported and "sold" by petitioners to Knuckles approximately two months before the challenged search. The conspiracy and transportation alleged by the indictment were carefully limited to the period before the day of the search.

In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. The vice of allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes, is not present. The Government cannot be accused of taking "advantage of contradictory positions." *Jones* v. *United States, supra,* at 263. See *United States* v. *Allsenberrie,* 424 F. 2d 1209, 1212–1214 (CA7 1970); *United States* v. *Cowan,* 396 F. 2d 83, 86 (CA2 1968); *Niro* v. *United States,* 388 F. 2d 535, 537 (CA1 1968); *United States* v. *Bozza,* 365 F. 2d 206, 223 (CA2 1966). But cf. *United States* v. *Price,* 447 F. 2d 23, 29 (CA2), cert. denied, 404 U. S. 912 (1971).

Again, we do not decide that this vice of prosecutorial self-contradiction warrants the continued survival of *Jones*' "automatic" standing now that our decision in *Simmons* has removed the danger of coerced self-incrimination. We simply see no reason to afford such "automatic" standing where, as here, there was no risk to a defendant of either self-incrimination or prosecutorial self-contradiction. Petitioners were afforded a full hearing on standing and failed to allege any legitimate interest of any kind in the premises searched or the merchandise seized.

Nor, incidentally, does the record reveal any such interest.[4] As the Court of Appeals correctly concluded, petitioners had no standing to contest the defective warrant used to search Knuckles' store; they could not then and cannot now rely on the Fourth Amendment rights of another. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. *Simmons* v. *United States*, 390 U. S. 377 (1968); *Jones* v. *United States*, 362 U. S. 257 (1960)." *Alderman* v. *United States*, 394 U. S. 165, 174 (1969). See *Wong Sun* v. *United States*, 371 U. S. 471, 492 (1963).

(2)

The Solicitor General concedes that, under *Bruton*, *supra*, statements made by petitioners were improperly admitted into evidence. Neither petitioner testified at the trial. The prosecution tendered police testimony as to statements made by Smith implicating Brown in the crimes charged, even though these statements were made out of Brown's presence.[5] This testimony was

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[4] Petitioners now contend that they had a partnership "property interest" in or "constructive possession" of the stolen goods found at Knuckles' store, as a conspiracy is a "partnership in crime." Even if the petitioners had not already "sold" the merchandise to Knuckles, their "property interest" in the merchandise was totally illegitimate. The "constructive possession" argument is equally ingenious, but equally unavailing. Even on the doubtful assumption that the alleged conspiracy between petitioners and Knuckles could support a "constructive possession" of the merchandise at Knuckles' store, the conspiracy was alleged to have continued only "to and including the 28th day of August, 1970." The seizure was made on August 29, 1970. Finally, these contentions were not made in the courts below or in the petition for certiorari. They are, therefore, not properly before this Court. *Lawn* v. *United States*, 355 U. S. 339, 362–363, n. 16 (1958).

[5] An FBI agent, Whitley, testified as follows:

"[Smith stated that] during June 1970, another individual who was also employed at Central Jobbing Company, one Joe Brown, had apadmitted into evidence. Similar statements, made by Brown relating to Smith, were also admitted. Petitioners' counsel made timely objections.

Upon an independent examination of the record, we agree with the Court of Appeals that the *Bruton* errors were harmless. The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury. In this case, as in *Harrington* v. *California,* 395 U. S. 250 (1969), the independent evidence "is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this . . . conviction undisturbed," *id.,* at 254. We reject the notion that a *Bruton* error can never be harmless. "[A] defendant is entitled to a fair trial but not a perfect one,"

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proached him and asked him to help steal merchandise from Central Jobbing Company and help him transport this merchandise to Manchester, Kentucky. He advised me that during June of 1970, he and Joe Brown made two trips to Manchester, Kentucky, with merchandise consisting of household goods and clothing which they had stolen from Central Jobbing Company. He recalled that to the best of his knowledge . . . these dates were June 5th and 29th, 1970. He said that he and Mr. Brown had received approximately one-half the value of the stolen merchandise from the owners of the Knuckles Discount Store in Manchester, Kentucky, and that the owners of the Discount Store knew that the merchandise was stolen. Mr. Smith stated further that he had received approximately $2,500.00 as his share of the money which they had received from the stolen merchandise."

Another witness, a Detective Hulgin from the County Sheriff's Patrol, had also testified to similar statements by Smith, adding that Smith had stated that the list, which was found by West at the warehouse, had been prepared and shown to him by Brown, and that the total price of $2,200 shown on the list was the amount of money that petitioners were to receive for that particular shipment to Knuckles. Hulgin also testified that he was told by Brown that Smith had accompanied Brown on two previous occasions when Brown delivered stolen goods to Knuckles.

for there are no perfect trials. *Bruton* v. *United States*, 391 U. S., at 135, quoting *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953). See *Schneble* v. *Florida*, 405 U. S. 427, 432 (1972); *Chapman* v. *California*, 386 U. S. 18, 23–24 (1967).

Affirmed.

DAVIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-6481. Argued February 20, 1973—Decided April 17, 1973

Three years after his conviction for a federal crime, petitioner brought this collateral attack on the ground of unconstitutional discrimination in the composition of the grand jury that indicted him. The District Court found that, though petitioner could have done so, he at no stage of the proceedings attacked the grand jury's composition, and it concluded that under Fed. Rule Crim. Proc. 12 (b)(2) he had waived his right to do so. The court also determined that since the challenged jury-selection method had long obtained, the grand jury that indicted petitioner indicted his two white accomplices, and the case against petitioner was "a strong one," there was no "cause shown" under the rule to grant relief from the waiver. The Court of Appeals affirmed. *Held:*

1. The waiver standard set forth in Fed. Rule Crim. Proc. 12 (b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding but also later on collateral review. *Shotwell Mfg. Co.* v. *United States,* 371 U. S. 341, followed; *Kaufman* v. *United States,* 394 U. S. 217, distinguished. Pp. 236-243.

2. The District Court, in the light of the record in this case, did not abuse its discretion in denying petitioner relief from the application of the waiver provision. Pp. 243-245.

455 F. 2d 919, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 245.

Melvin L. Wulf argued the cause and filed briefs for petitioner.

Edward R. Korman argued the cause for the United States. With him on the brief were *Solicitor General*

Griswold, Assistant Attorney General Petersen, and *Sidney M. Glazer.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are called upon to determine the effect of Rule 12 (b)(2) of the Federal Rules of Criminal Procedure on a post-conviction motion for relief which raises for the first time a claim of unconstitutional discrimination in the composition of a grand jury. An indictment was returned in the District Court charging petitioner Davis, a Negro, and two white men with entry into a federally insured bank with intent to commit larceny in violation of 18 U. S. C. §§ 2 and 2113 (a). Represented by appointed counsel,[1] petitioner entered a not-guilty plea at his arraignment and was given 30 days within which to file pretrial motions. He timely moved to quash his indictment on the ground that it was the result of an illegal arrest, but made no other pretrial motions relating to the indictment.

On the opening day of the trial, following *voir dire* of the jury, the District Judge ruled on petitioner's pretrial motions in chambers and ordered that the motion to quash on the illegal arrest ground be carried with the case. He then asked twice if there were anything else before commencing trial. Petitioner was convicted and sentenced to 14 years' imprisonment. His conviction was affirmed on appeal. 409 F. 2d 1095 (CA5 1969).

**Jack Greenberg, James M. Nabrit III,* and *Charles Stephen Ralston* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

[1] Petitioner was represented throughout the trial by competent, court-appointed counsel, whose advocacy prompted the Court of Appeals to compliment him saying:

"We have rarely witnessed a more thorough or more unstinted expenditure of effort by able counsel on behalf of a client." 409 F. 2d 1095, 1101 (CA5 1969).

Post-conviction motions were thereafter filed and denied, but none dealt with the issue presented in this case. Almost three years after his conviction, petitioner filed the instant motion to dismiss the indictment, pursuant to 28 U. S. C. § 2255, alleging that the District Court had acquiesced in the systematic exclusion of qualified Negro jurymen by reason of the use of a "key man" system of selection,[2] an asserted violation of the "mandatory requirement of the statute laws set forth . . . in title 28, U. S. C. A. Section 1861, 1863, 1864, and the 5th amendment of the United States Constitution."[3] His challenge only went to the composition of the grand jury and did not include the petit jury which found him guilty. The District Court, though it took no evidence on the motion, invited additional briefs on the issue of waiver. It then denied the motion. In its memorandum opinion it relied on *Shotwell Mfg. Co.* v. *United States,* 371 U. S. 341 (1963), and concluded that petitioner had waived his right to object to the composition of the grand jury because such a contention is waived under Rule 12 (b)(2) unless raised by motion prior to trial. Also, since the "key man" method of selecting grand jurors had been openly followed for many years prior to petitioner's indictment; since the same grand jury that indicted petitioner indicted his two white accomplices; and since the case against petitioner was "a strong one," the court determined that there was nothing in the facts of the case or in the nature of the claim justifying the exercise of the power to grant relief under Rule 12 (b)(2) for "cause shown."

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[2] The use of the "key man" system was approved in *Scales* v. *United States,* 367 U. S. 203, 259 (1961), affirming 260 F. 2d 21, 44-46 (CA4 1958). The adoption of the Jury Selection and Service Act of 1968, 28 U. S. C. §§ 1861-1869, has precluded its further use.

[3] Petitioner also alleged that a timely oral motion in open court prior to trial was made preserving for him the right to contest the grand jury array, and that a law student who was researching the grand jury array was stopped from seeing him.

The Court of Appeals affirmed on the basis of *Shotwell, supra,* and Rule 12 (b)(2). Because its decision is contrary to decisions of the Ninth Circuit in *Fernandez* v. *Meier,* 408 F. 2d 974 (1969), and *Chee* v. *United States,* 449 F. 2d 747 (1971), we granted certiorari to resolve the conflict.

Petitioner contends that because his § 2255 motion alleged deprivation of a fundamental constitutional right, one which has been recognized since *Strauder* v. *West Virginia,* 100 U. S. 303 (1880), his case is controlled by this Court's dispositions of *Kaufman* v. *United States,* 394 U. S. 217 (1969), and *Sanders* v. *United States,* 373 U. S. 1 (1963), rather than *Shotwell Mfg. Co.* v. *United States, supra,* and Rule 12 (b)(2). Accordingly, he urges that his collateral attack on his conviction may be precluded only after a hearing in which it is established that he "deliberately bypassed" or "understandingly and knowingly" waived his claim of unconstitutional grand jury composition. See *Fay* v. *Noia,* 372 U. S. 391 (1963), and *Johnson* v. *Zerbst,* 304 U. S. 458 (1938).

I

Rule 12 (b)(2) provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." By its terms, it applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court. According to the Notes of the Advisory Committee on Rules, the waiver provision was designed to continue existing law, which as exemplified by this Court's decision in *United States* v. *Gale,* 109 U. S. 65 (1883), was, *inter alia,* that defendants who pleaded to an indictment and went to trial without making any nonjurisdictional objection to the grand jury, even one unconstitutionally composed, waived any right of subsequent complaint on account thereof. Not surprisingly, therefore, the Advisory Committee's Notes expressly indicate that claims such as petitioner's are meant to be within the Rule's purview:

> "These two paragraphs [12 (b)(1) and (2)] classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12 (a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. . . .
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> ". . . Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury . . . ." Notes of Advisory Committee following Fed. Rule Crim. Proc. 12, 18 U. S. C. App.

This Court had occasion to consider the Rule's application in *Shotwell Mfg. Co.* v. *United States, supra,* a case involving tax-evasion convictions. In a motion filed more than four years after their trial, but before the conclusion of direct review, petitioners alleged that both the grand and petit jury arrays were illegally constituted because, *inter alia,* "the Clerk of the District Court failed to employ a selection method designed to secure a cross-section of the population."[4] 371 U. S., at 361–362.

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[4] Petitioner attempts to distinguish *Shotwell* on the ground that the case "involved legal irregularities which did not rise to the

Deeming the case controlled by Rule 12 (b)(2), the District Court held a hearing to determine whether there was "cause" warranting relief from the waiver provision and it found that "the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial." *Id.*, at 363. It concluded that their failure to exercise due diligence combined with the absence of prejudice from the alleged illegalities precluded the raising of the issue, and the Court of Appeals affirmed. In this Court, petitioners conceded that Rule 12 (b)(2) applied to their objection to the grand jury array, but they denied that it applied to the petit jury. Both objections were held foreclosed by the petitioners' years of inaction, and the lower courts' application of the Rule was affirmed.

Shotwell thus confirms that Rule 12 (b)(2) precludes untimely challenges to grand jury arrays, even when such challenges are on constitutional grounds.[5] Despite the strong analogy between the effect of the Rule as construed in *Shotwell* and petitioner's § 2255 allegations, he nonetheless contends that *Kaufman* v. *United States*, *supra*, establishes that he is not precluded from raising

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dimension of the fundamental constitutional right asserted" herein. (Brief for Petitioner 18.) At 362–363 of the Court's opinion in *Shotwell*, however, the majority accepted petitioners' assertion of constitutional deprivation at face value before rejecting their claims on the basis of Rule 12 (b)(2).

[5] We are comforted in this conclusion by the concurrence of all but one of the courts of appeals that have considered the issue. See *Moore* v. *United States*, 432 F. 2d 730, 740 (CA3 1970) (*en banc*); *Juelich* v. *Harris*, 425 F. 2d 814 (CA7 1970); *United States* v. *Williams*, 421 F. 2d 529, 532 (CA8 1970); *Bustillo* v. *United States*, 421 F. 2d 131 (CA5 1970); and *Poliafico* v. *United States*, 237 F. 2d 97 (CA6 1956). Contra, *Fernandez* v. *Meier*, 408 F. 2d 974 (CA9 1969).

his constitutional challenge in a § 2255 proceeding.[6] See *Fay* v. *Noia, supra.* We disagree.

In *Kaufman,* the defendant in a bank robbery conviction sought collateral relief under § 2255 alleging that illegally seized evidence had been admitted against him at trial, over a timely objection, and that this evidence resulted in the rejection of his only defense to the charge. The application was denied in both the District Court and the Court of Appeals on the ground that it had not been raised on appeal from the judgment of conviction and "that a motion under § 2255 cannot be used in lieu of an appeal." 394 U. S., at 223. This Court reversed, however, holding that when constitutional claims are asserted, post-conviction relief cannot be denied solely on the ground that relief should have been sought by appeal. *Ibid.*

But the Court in *Kaufman* was not dealing with the sort of express waiver provision contained in Rule 12 (b) (2) which specifically provides for the waiver of a particular kind of constitutional claim if it be not timely asserted. The claim in *Kaufman* was that the applicable provisions of § 2255 by implication forbade the assertion of a constitutional claim of unlawful search and seizure where the defendant failed to assert the claim on appeal from the judgment of conviction.[7] See, *e. g., Sunal* v. *Large,* 332 U. S. 174, 179 (1947). The Court held that the statute did not preclude the granting of relief on such a claim simply because it had not been asserted on appeal, where there was no indication of a knowing and deliberate bypass of the appeal procedure. But here the Government's claim is not that § 2255 itself limits or precludes the assertion of petitioner's claim, but that the separate provisions of Rule 12 (b)(2) do so. *Kaufman,* therefore, is dispositive only if the absence of a statutory provision for waiver in § 2255 and the federal habeas statute by implication precludes the application to post-conviction proceedings of the express waiver provision found in the Federal Rules of Criminal Procedure.

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[6] Petitioner relies on the reasoning of *Fernandez, supra,* in arguing that a different waiver rule should apply in § 2255 proceedings. In that case, the defendant argued that the exclusion of Spanish Americans from his grand and petit juries constituted a deprivation of constitutional right. The claim was untimely raised and the Court of Appeals conceded that failure to present it as provided in Rule 12 (b) (2) resulted in a waiver. Relying, however, on this Court's decisions in *Fay* v. *Noia,* 372 U. S. 391 (1963), and *Sanders* v. *United States,* 373 U. S. 1 (1963), that court held that collateral relief could be denied under § 2255 only upon a showing of a "knowing and deliberate by-pass" of a timely objection. Petitioner concedes that the court misread *Sanders, supra,* but he argues that it applied the correct waiver rule. Although we find it difficult to conceptualize the application of one waiver rule for purposes of federal appeal and another for purposes of federal habeas corpus, we will nonetheless give consideration to petitioner's claim that the cases interpreting the federal habeas corpus statute set the applicable standard.

Shotwell held that a claim of unconstitutional grand jury composition raised four years after conviction, but while the appeal proceedings were still alive, was governed by Rule 12 (b)(2). Both the reasons for the Rule and the normal rules of statutory construction clearly indicate that no more lenient standard of waiver should apply to a claim raised three years after conviction simply because the claim is asserted by way of collateral attack rather than in the criminal proceeding itself.

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[7] The Court in *Kaufman* made reference to the possibility of the denial of § 2255 relief as a result of a deliberate bypass of the suppression procedures established in Fed. Rule Crim. Proc. 41 (e). *Kaufman* v. *United States,* 394 U. S. 217, 227 n. 8 (1969). But it had no occasion to consider that Rule's effects on § 2255 motions since there "[a]ppointed counsel had objected at trial to the admission of certain evidence on grounds of unlawful search and seizure," *id.,* at 220 n. 3, and the District Court's rationale for denying relief was that "this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack . . . ." See *id.,* at 219.

The waiver provisions of Rule 12 (b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

Rule 12 (b)(2) promulgated by this Court and, pursuant to 18 U. S. C. § 3771, "adopted" by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived. See *Singer* v. *United States,* 380 U. S. 24, 37 (1965). Were we confronted with an express conflict between the Rule and a prior statute, the force of § 3771, providing that "[a]ll laws in conflict with such rules shall be of no further force or effect," is such that the prior inconsistent statute would be deemed to have been repealed. Cf. *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 10 (1941). The Federal Rules of Criminal Procedure do not *ex proprio vigore* govern post-conviction proceedings, and had Congress in enacting the statutes governing federal collateral relief specifically there dealt with the issue of waiver, we would be faced with a difficult question of repeal by implication of such a provision by the later enacted rules of criminal procedure. But Congress did not deal with the question of waiver in the federal collateral relief statutes, and in *Kaufman* this Court held that, since § 2255 had not spoken on the subject of waiver with respect to claims of unlawful search and seizure, a particular doctrine of waiver would be applied by this Court in interpreting the statute.

We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of "cause" for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12 (b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of "cause" which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12 (b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

Our conclusion in this regard is further buttressed by the Court's observation in *Parker* v. *North Carolina,* 397 U. S. 790, 798 (1970), decided the year after *Kaufman,* that "[w]hether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide." The context of the Court's language makes it apparent that the question was framed in terms of waiver and timely assertion of such a claim in state criminal proceedings. But if the question were left open with respect to state proceedings, it must have been at least patently open with respect to federal habeas review of federal convictions, where Congress is the lawgiver both as to the procedural rules governing the criminal trial and the principles governing collateral review.

II

The principles of Rule 12 (b)(2), as construed in *Shotwell,* are not difficult to apply to the facts of this case. Petitioner alleged the deprivation of a substantial constitutional right, recognized by this Court as applicable to state criminal proceedings from *Bush* v. *Kentucky,* 107 U. S. 110 (1883), through *Alexander* v. *Louisiana,* 405 U. S. 625 (1972). But he failed to assert the claim until long after his trial, verdict, sentence, and appeal had run their course. In findings challenged only halfheartedly here, the District Court determined that no motion, oral or otherwise, raised the issue of discrimination in the selection of the grand jurors prior to trial. The Court of Appeals affirmed, and on petition for rehearing conducted its own search of the record in a vain effort to see whether the files or docket entries in the case supported petitioner's contention that he had made such a motion. We will not disturb the coordinate findings of these two courts on a question such as this.

The waiver provision of the Rule therefore coming into play, the District Court held that there had been no "cause shown" which would justify relief. It said:

> "Petitioner offers no plausible explanation of his failure to timely make his objection to the composition of the grand jury. The method of selecting grand jurors then in use was the same system employed by this court for years. No reason has been suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to trial. The same

> grand jury that indicted petitioner also indicted his two white accomplices. The case had no racial overtones. The government's case against petitioner was, although largely circumstantial, a strong one. There was certainly sufficient evidence against petitioner to justify a grand jury in determining that he should stand trial for the offense with which he was charged. . . . Petitioner has shown no cause why the court should grant him relief from his waiver of the objection to the composition of the grand jury . . . ."

In denying the relief, the court took into consideration the question of prejudice to petitioner. This approach was approved in *Shotwell* where the Court stated:

> "[W]here, as here, objection to the jury selection has not been timely raised under Rule 12 (b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule." 371 U. S., at 363.

Petitioner seeks to avoid this aspect of *Shotwell* by asserting that there both lower courts had found that petitioners were not prejudiced in any way by the alleged illegalities whereas under *Peters* v. *Kiff,* 407 U. S. 493 (1972), prejudice is presumed in cases where there is an allegation of racial discrimination in grand jury composition. But *Peters* dealt with whether or not a white man had a substantive constitutional right to set aside his conviction upon proof that Negroes had been systematically excluded from the state grand and petit juries which indicted and tried him. Three Justices dissented from the Court's upholding of such a substantive right on the ground that no prejudice had been shown, and three concurred separately in the judgment. But the three opinions delivered in *Peters, supra,* all indicate a focus on the existence of the constitutional right, rather than its possible loss through delay in asserting it. The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

We hold that the District Court did not abuse its discretion in denying petitioner relief from the application of the waiver provision of Rule 12 (b)(2), and that having concluded he was not entitled to such relief, it properly dismissed his motion under § 2255. Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The opinion of the Court obscures the only sensible argument for the result the majority reaches. I am not persuaded by that argument, and find the majority opinion clearly defective. I believe that Rule 12 (b)(2), properly interpreted in the light of the purposes it serves and the purposes served by making available collateral relief from criminal convictions, does not bar a prisoner from claiming that the grand jury that indicted him was unconstitutionally composed, if he shows that his failure to make that claim before trial was not "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). But first there is some underbrush to be cleared away.

Davis challenged the "key man" system of selection of grand jurors used in the Northern District of Mississippi in 1968, when he was indicted, because it was implemented to exclude qualified Negroes from the grand jury.[1] Cf. *Glasser* v. *United States,* 315 U. S. 60, 85–87 (1942); *Dow* v. *Carnegie-Illinois Steel Corp.,* 224 F. 2d 414 (CA3 1955). The Court notes that the use of the "key man" system was approved by this Court in *Scales* v. *United States,* 367 U. S. 203 (1961).[2] This observation is both irrelevant and misleading. It is irrelevant because the Court's holding today bars prisoners from raising meritorious claims not raised before trial.[3] A prisoner like Davis could not contend after today's decision, for example, that federal jury commissioners had simply refused to place the names of Negroes in the jury box used in 1968. That, of course, would have been unconstitutional. See *Alexander* v. *Louisiana,*

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[1] Davis alleged, in part:

"(b) that the jury commissioner and Clerk of Court for the Northern District of Mississippi for the past 20 years implementing the 'Keyman' and 'Selectors,' system cause nought to token in their selection of prospective qualifying negro jurymen because of their race and color in violation of Section 1863.

"(c) that the Northern District Court has by its affirmative action taken for the past 20 years has acquiesced to systematically, purposefully, unlawfully and unconstitutionally excluded the prospective qualified resident negroes from the Grand Jury box in violation of Section 1864.

"(d) that the petitioner being a member of the negro race has been prejudiced by the aforesaid violation caused by the violators in carrying out their duties, and has denied petitioner his constitutional right, guaranteed to him by the Sixth Amendment, the right to a fair cross-section of the community." App. 7.

[2] Under a "key man" system, jury commissioners ask persons who are thought to have wide contacts in the community to supply the names of prospective jurors.

[3] Similarly, the Jury Selection and Service Act of 1968, 28 U. S. C. §§ 1861–1869, can be administered in an unconstitutional manner. Its adoption might have some bearing on our decision to review a holding that the "key man" system used in Mississippi in 1968 was constitutional, but the new Act is plainly irrelevant to the question presented by this case.

405 U. S. 625, 628–629 (1972); *Hill* v. *Texas,* 316 U. S. 400 (1942).[4] The Court's observation is misleading because in *Scales* the Court said only that "no impropriety in the method of choosing grand jurors has been shown," as to a grand jury convened in the Middle District of North Carolina in 1955, 367 U. S., at 206 n. 2, 259. I doubt that the Court meant to suggest that the use of a "key man" system was immune from constitutional attack. Indeed, *Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970), and the cases there cited, show that systems essentially the same as a "key man" system may be administered in an unconstitutional manner.[5]

To the extent that our prior decisions speak to the issue in this case, the Court's decision today seems inconsistent with them. The Court purports to distinguish *Kaufman* v. *United States,* 394 U. S. 217 (1969), for example, on the ground that we were there "not dealing with the sort of express waiver provision contained in Rule 12 (b)(2)." I had not thought that words were quite so magical as that distinction makes them. It is true, of course, that Rule 12 (b)(2) provides that "[d]efenses and objections based on defects in the institution of the prosecution . . . may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." *Kaufman* involved a claim that the prisoner was convicted on the basis of evidence obtained in an unconstitutional search. And Rule 41 (e) of the Federal Rules of Criminal Procedure provides that a motion to suppress the use of the evidence obtained in an unlawful search "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

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[4] Those cases involved discrimination unconstitutional because of the Equal Protection Clause of the Fourteenth Amendment. But the Due Process and Grand Jury Clauses of the Fifth Amendment make unconstitutional the same discrimination in the federal system. *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954).

[5] The Court also notes that its conclusion is "buttressed by the Court's observation in *Parker* v. *North Carolina,* 397 U. S. 790, 798 (1970) . . . that '[w]hether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide.'" I am at a loss to understand how that observation buttresses the Court's holding today. In *Parker* we were reviewing a state court's decision to deny collateral relief under state law. The state court had refused to consider Parker's claim that the grand jury was unconstitutionally composed because he had failed to raise the claim before trial. That was either an adequate state ground, in a procedural sense, or a construction of the state collateral-relief statute. No matter how considered, though, the Court clearly had no jurisdiction to consider the constitutional claim. It would have been odd indeed had we decided that Parker's claim could or could not be raised in a federal habeas corpus action. The observation on which the majority relies can only mean that the question had not then been decided by this Court. I fail to understand how the fact that a question had not been resolved supports any particular resolution of a similar question. In the sense of "buttressed" used by the majority, *Parker* also buttresses my position.

In *Kaufman,* we indicated that the failure to make a timely motion to suppress would permit the § 2255 court to deny relief where that failure was a deliberate bypass of the orderly procedures set out in the Rules of Criminal Procedure. 394 U. S., at 227 n. 8. Relief under § 2255 would be barred only if there had been an intentional relinquishment of a known right.[6] Rule 41 (e) does not

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[6] Kaufman had raised the search issue at trial, but his counsel on appeal did not pursue it. 394 U. S., at 220 n. 3. Ordinarily, the failure to pursue a claim in the Court of Appeals bars further review. It does so in the nature of things with respect to consideration by the Court of Appeals. And as to review in this Court, see *Lawn* v. *United States,* 355 U. S. 339, 362 n. 16 (1958).

That a rule makes a waiver "express," rather than a series of holdings doing the same, should affect analysis only if the fact that use the apparently crucial word "waiver." But its structure is basically the same as that of Rule 12 (b)(2): the motions shall be made at a certain time, and failure to make them may be excused for cause. Nothing in the opinion of the Court suggests why the use of the word "waiver" makes such a difference, so that *Kaufman* permits consideration of claims not made in the time set by Rule 41 (e) in a § 2255 proceeding, while claims not made in the time set by Rule 12 (b)(2) may not be considered. There is a clear line of cases in the courts of appeals holding that failure to make a timely motion to suppress evidence bars an attempt to raise the Fourth Amendment issue on appeal. See, *e. g., United States* v. *Ellis,* 461 F. 2d 962 (CA2 1972); *United States* v. *Volkell,* 251 F. 2d 333 (CA2 1958), and cases cited therein. Certainly the use of the word "waiver" in Rule 12 (b)(2) does not make any clearer the notice to attorneys that the failure to make a timely claim about the composition of the grand jury will bar later attempts to raise that claim.

In light of the similarity between *Kaufman* and this case, the only way that I can understand the Court's action is to assume that the Court believes there are strong reasons of policy justifying "an airtight system of forfeitures," *Fay* v. *Noia,* 372 U. S. 391, 432 (1963), with respect to a claim that the grand jury was unconstitutionally composed, reasons that are not applicable to a claim that evidence unconstitutionally seized was used at trial. All that I can find in the opinion of the Court, however, is one sentence referring to such policy considerations: "Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an

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the waiver is "express" makes some difference in terms of policy. The Court offers no reasons why the "express" waiver bears on any relevant policies of § 2255.

otherwise valid conviction at a time when reprosecution might well be difficult."[7]

That, I submit, is once again both irrelevant and misleading. It is misleading because it relies on a mechanical invocation of the difficulties of reprosecution in a setting where those difficulties are patently quite small. When evidence used at trial is ordered suppressed and a retrial required, the prosecution must reconstruct its case with a new focus; it may have to gather new evidence, or find new witnesses, or it may have to elicit new testimony from witnesses who testified before. In such a setting, there may well be difficulties in reprosecution. But when a new trial is required so that an indictment may be returned by a properly constituted grand jury, those difficulties simply do not arise. Nothing in the previous trial must be redone; indeed, the prosecution could present its entire case through the testimony given at the previous trial, if it showed that its witnesses were now unavailable and thus that the alleged difficulties in reprosecution were real. Cf. *Mattox* v. *United States,* 156 U. S. 237 (1895). All that the prosecution might lose is the enhancement of credibility, if any, that the actual presence of the witnesses could lend their testimony.

The Court's reference to "[s]trong tactical considerations" is irrelevant because a prisoner would properly be held to have intentionally relinquished his right to raise the constitutional claim if he failed to raise it for tactical reasons. The only issue in this case is whether one who claims that he did not intentionally relinquish a known right is to be afforded the opportunity to prove that claim, as a step toward establishing that his rights were in fact infringed. Saying that Davis, who makes just such a claim, cannot be allowed to prove it because some other prisoners might have made a tactical choice not to raise the underlying issue, is just not responsive to his argument.[8]

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[7] The sentence preceding that one in the opinion of the Court simply says that some incentive to raise the claim is necessary. It does not say why the system of foreclosures must be airtight.

The Solicitor General has urged on us policy considerations that at least bear on the decision whether the Government's interest in enforcing an airtight system of forfeitures with respect to claims going to the composition of the grand jury is greater than its interest in enforcing a similar system with respect to claims going to the admission of illegally seized evidence. He argues that the crucial difference lies in the ease with which the prosecution can reconstruct its case on a proper basis. It is relatively easy, he says, to remedy the return of an indictment by an unconstitutionally composed grand jury. All that must be done is to convene a properly composed grand jury. But if the result of a finding of error is to wash out not just the indictment but also an entire trial, that error is very costly to legitimate interests in economy. Thus, failure to raise a claim relating to the composition of the grand jury prior to trial may entail large costs. In contrast, the Solicitor General suggests, failure to raise a claim before trial relating to the use of the fruits of an unconstitutional search is not quite so costly. Whenever the finding that the search was unlawful is made, the prosecution will have to reconstruct its case rather substantially. New witnesses may have to be found, and more emphasis must be placed upon the testimony of witnesses that is not tainted by the search. There is, on this view, a very important reason for enforcing an airtight system of foreclosures where the claim is that an easily remedied error has been made—it is simply much more costly to require retrials in those cases.

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[8] The difficulties in proving that a tactical choice was made not to raise the grand jury claim are, so far as I can tell, no different from proving that a tactical choice was made not to make a motion to suppress or to object to a prosecutor's comments on a defendant's failure to testify, both decisions to which this Court has applied the traditional test of waiver. *Kaufman* v. *United States,* 394 U. S. 217 (1969); *Camp* v. *Arkansas,* 404 U. S. 69 (1971).

That argument undoubtedly has some force. But it also goes too far, for it is inconsistent with the power given to reverse a conviction on the basis of plain error to which no objection had been made. Fed. Rule Crim. Proc. 52 (b). An improper argument by a prosecutor in his closing argument may be plain error, for example. *Doty* v. *United States,* 416 F. 2d 887, 890–891 (CA10 1968), and cases cited. Yet timely objection might have cut off the improper argument at a point when an admonition to the jury to disregard it would adequately protect the defendant's rights. A system that permits reversal on the ground of plain error to which no objection had been made but prohibits reversal on the ground that timely objection to the composition of the grand jury had not been made by a defendant who did not intentionally relinquish his right to object, and that justifies the latter rule in terms of governmental interests in economy, seems to me perverse.

The Solicitor General's argument is unpersuasive, ultimately, not alone for the reasons just given, but also because the legitimate governmental interests that support a strict system of forfeitures with respect to claims about the composition of the grand jury are, in my view, outweighed by other important public interests.[9] First, and most important in this case, we must assure that no one is excluded from participation in important democratic institutions like the grand jury because of race. Second, convicted offenders will be more amenable to rehabilitation when they know that all their claims of unfairness have been considered, unless they deliberately refrained from raising them at an earlier point. Finally, providing the opportunity to raise such claims at any point in the process, so long as the offender did not willingly conceal them for strategic reasons, helps guarantee that the process of criminal justice is fair, and does so without benefiting someone who was delinquent in his attempts to preserve the fairness of the process.

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[9] Since nothing distinguishes this case from others involving, for example, claims of illegal searches, *Kaufman* v. *United States, supra,* in terms of the governmental interest in finality in criminal litigation, I do not discuss that interest here. The Government must be able to assert interests peculiar to grand jury claims in order to show that those interests outweigh countervailing public interests served by leaving those claims open to later determination.

"For over 90 years, it has been established that a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race. *Strauder* v. *West Virginia,* 100 U. S. 303 (1880); *Neal* v. *Delaware,* 103 U. S. 370 (1881)." *Alexander* v. *Louisiana,* 405 U. S. 625, 628 (1972). "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter* v. *Jury Comm'n,* 396 U. S., at 329. When it fulfills its proper function, the grand jury is a central institution of our democracy, restraining the discretion of prosecutors to institute criminal proceedings. Cf. *United States* v. *Dionisio,* 410 U. S. 1, 17 (1973); *Wood* v. *Georgia,* 370 U. S. 375, 390 (1962). Although there may be other ways to vindicate the right of every qualified citizen to participate in the grand jury without discrimination based on race, *Carter* v. *Jury Comm'n, supra,* this Court has consistently allowed criminal defendants to assert the rights of excluded groups without requiring that they show prejudice in the particular case. *Ballard* v. *United States,* 329 U. S. 187, 195 (1946). This is contrary to the general rule that no one has standing to assert the rights of others, *Moose Lodge No. 107* v.

Irvis, 407 U. S. 163, 166–167 (1972). It is justified by the importance of assuring every opportunity to raise claims of unconstitutional discrimination in the selection of grand juries. That principle alone, in my view, would warrant a very restrictive view of attempts to foreclose the opportunity to raise such claims.

But there is more. Offenders who have been indicted by unconstitutionally composed grand juries undeniably are aggrieved. There is a paramount public interest that the process of criminal justice be fair. As we said in *Kaufman* v. *United States*, 394 U. S., at 226, "The provision of federal collateral remedies rests . . . upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." The function of collateral relief "has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must *always* be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U. S., at 401–402 (emphasis added). The traditional scope of collateral relief requires, again, that prisoners be afforded the broadest possible opportunity to present claims that their detention is the result of an unconstitutional procedure.[10]

I do not deny that there is an interest in enforcing compliance with reasonable procedural requirements by a system of forfeitures, so that claims will be raised at a time when they may easily be determined and necessary corrective action taken. But I do not believe that the system of forfeitures must be so comprehensive and rigid that a person may not raise a claim of discrimination in the selection of the grand jury even though he made no deliberate, informed choice to forgo the claim. Such a system too grievously affects other important interests.

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[10] Indeed, this Court has suggested that any narrowing of those opportunities would itself be an unconstitutional suspension of the writ of habeas corpus, Art. I, § 9, cl. 2. *Fay* v. *Noia*, 372 U. S. 391, 406 (1963); *Sanders* v. *United States*, 373 U. S. 1, 11–12 (1963).

With these principles in mind, the resolution of this case is not difficult. Rule 12 (b)(2) provides that "the court for cause shown may grant relief from the waiver." I would hold that, when a prisoner shows that his failure to raise a claim of discrimination in the selection of the grand jury was not an intentional relinquishment of a known right, he has shown cause for relief from the waiver.[11] The prior cases, which Rule 12 (b)(2) is said to have continued, did not examine in any detail the circumstances in which failure to object was held to constitute a waiver. See, *e. g., United States* v. *Gale,* 109 U. S. 65 (1883); *In re Wilson,* 140 U. S. 575 (1891). Cf. *Kohl* v. *Lehlback,* 160 U. S. 293 (1895). It is clear that in none of those cases did the prisoner show that his failure to object was not an intentional relinquishment of a known right.[12]

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[11] I do not understand the Court's contention that this is a "liberal requirement." It is true of course that waiver will not be presumed from a silent record. Cf. *Carnley* v. *Cochran,* 369 U. S. 506, 516 (1962). But in a case like this, the record is not silent; it shows that the defendant did not object to the composition of the grand jury. (I do not quarrel with the Court's reliance on the finding made below that, despite Davis' allegations, no pretrial objection was made.) Thus, the burden is on him to show that he did not know of his right to object to the composition of the grand jury, or that, knowing of his rights, he nonetheless did not exercise them because, for example, he feared that to do so would generate hostility that would adversely affect his chances of acquittal.

[12] In a related setting, this Court has interpreted language that might be thought to preclude later claims in a manner similar to that I would adopt here. *Sanders* v. *United States, supra,* involved the question whether failure to raise a claim in a pre-

Shotwell Mfg. Co. v. *United States,* 371 U. S. 341 (1963), does not reflect a contrary interpretation of Rule 12 (b)(2). There a corporation and two of its officers were indicted for attempted income tax evasion. Four years after trial, they attacked the composition of the grand and petit juries. They contended that there was newly discovered evidence that the Clerk of the District Court had failed to use a method of selecting grand jurors designed to secure a cross section of the community. Thus, they did not contend that they had not known of their right to be indicted by a representative grand jury. Clearly, to establish that that right had been infringed, they had to find evidence relating to the method of selection. The District Court found that such evidence was "notorious and available to petitioners in the exercise of due diligence before the trial." *Id.,* at 363. I have little difficulty in saying that, where one must present evidence in order to support a constitutional claim, the failure to exercise due diligence in searching for that evidence is a deliberate relinquishment of that claim.

The interpretation I would give to "good cause" is supported, finally, by this Court's insistence that acquiescence in the loss of constitutional rights is not lightly to be assumed. See *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938); *Aetna Insurance Co.* v. *Kennedy,* 301 U. S. 389, 393 (1937), and cases cited therein at n. 2. It is well established that a procedural rule that unreasonably

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vious petition for collateral relief precluded consideration of that claim in a later petition. There was a statutory provision that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U. S. C. § 2255. The term "similar relief" was interpreted to mean relief based upon the same claim that was presented before, or upon a claim that had intentionally been relinquished, 373 U. S., at 15–18.

precludes the vindication of constitutional rights itself raises serious constitutional questions. See, *e. g., Reece* v. *Georgia,* 350 U. S. 85 (1955); *Davis* v. *Wechsler,* 263 U. S. 22 (1923); *Williams* v. *Georgia,* 349 U. S. 375, 399 (1955) (Clark, J., dissenting). In *Johnson* v. *Zerbst, supra,* this Court adopted a definition of waiver that can be applied to serve all valid interests in barring untimely assertions of constitutional rights while not precluding claims by defendants who have not abused the procedural system. No convincing reasons have been advanced to adopt a more restrictive definition of waiver in this case. If Davis did not intentionally relinquish a known right, I do not see any valid interest in keeping him from asserting that right in this § 2255 action.

Davis alleged in his motion for collateral relief that "he had not waived nor abandoned this right to contest the Grand Jury array." App. 8. This is enough, in a motion submitted by a prisoner unaided by counsel, to constitute an allegation that he had not intentionally relinquished a known right. Cf. *Haines* v. *Kerner,* 404 U. S. 519 (1972). It is a factual allegation not refuted by the record in the case, 28 U. S. C. § 2255, and Davis should have an opportunity to prove this allegation. I would therefore reverse the judgment below.

TOLLETT, WARDEN *v.* HENDERSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-95. Argued February 20, 1973—Decided April 17, 1973

Where a state criminal defendant, on advice of counsel, pleads guilty he cannot in a federal habeas corpus proceeding raise independent claims relating to the deprivation of constitutional rights that antedated the plea, *Brady* v. *United States,* 397 U. S. 742, such as infirmities in the grand jury selection process, but may only attack the voluntary and intelligent character of the guilty plea by showing that counsel's advice was not within the standards of *McMann* v. *Richardson,* 397 U. S. 759. Pp. 261-269.

459 F. 2d 237, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 269.

R. Jackson Rose, Assistant Attorney General of Tennessee, argued the cause for petitioner. With him on the brief were *David M. Pack,* Attorney General, and *Bart C. Durham III* and *William C. Koch,* Assistant Attorneys General.

H. Fred Hoefle, by appointment of the Court, 409 U. S. 1004, argued the cause and filed a brief for respondent.*

**Evelle J. Younger,* Attorney General, *Edward A. Hinz, Jr.,* Chief Assistant Attorney General, *Doris H. Maier* and *Edward P. O'Brien,* Assistant Attorneys General, and *Gloria F. DeHart,* Deputy Attorney General, filed a brief for the State of California as *amicus curiae* urging reversal.

Jack Greenberg, James M. Nabrit III, and *Charles Stephen Ralston* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Twenty-five years ago respondent was indicted for the crime of first-degree murder by a grand jury in Davidson County, Tennessee. On the advice of counsel, he pleaded guilty and was sentenced to a term of 99 years in prison. Many years later he sought habeas corpus in both state and federal courts. In one petition in United States District Court, he contended that a confession he had given to the police had been coerced, and that he had been denied the effective assistance of counsel. The District Court considered these claims and decided them adversely to respondent, the Court of Appeals for the Sixth Circuit affirmed without opinion, and this Court denied certiorari. *Henderson* v. *Henderson,* 391 U. S. 927 (1968). Respondent then sought state habeas corpus, alleging for the first time that he was deprived of his constitutional right because Negroes had been excluded from the grand jury which indicted him in 1948. After a series of proceedings in the Tennessee trial and appellate courts, the Tennessee Court of Criminal Appeals ultimately concluded that respondent had waived his claim by failure to raise it before pleading to the indictment, and by pleading guilty.

Respondent then filed in the United States District Court the petition for habeas corpus which commenced the present litigation, asserting the denial of his constitutional right by reason of the systematic exclusion of Negroes from grand jury service. Petitioner, in effect, conceded such systematic exclusion to have existed, and the District Court so found. The issue upon which the District Court and the Court of Appeals focused was whether respondent's failure to object to the indictment within the time provided by Tennessee law constituted a waiver of his Fourteenth Amendment right to be indicted by a constitutionally selected grand jury.

At a state hearing, respondent testified that his lawyer did not inform him of his constitutional rights with respect to the composition of the grand jury, that he did not know how the grand jury was selected or that Negroes were systematically excluded, and that his attorney did not tell him that he could have challenged the indictment, or that failure to challenge it would preclude him from later raising that issue. An unchallenged affidavit submitted by the attorney who represented respondent in the 1948 criminal proceeding stated that counsel did not know as a matter of fact that Negroes were systematically excluded from the Davidson County grand jury, and that therefore there had been no occasion to advise respondent of any rights he had as to the composition or method of selection of that body.

On the basis of this evidence, the Court of Appeals held that the record demonstrated no such "waiver" of constitutional rights as that term was defined in *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938)—"an intentional relinquishment or abandonment of a known right or privilege." The Court of Appeals went on to affirm the judgment of the District Court, which had ordered respondent released from custody because Negroes had been excluded from the grand jury which indicted him for the offense in question. We granted certiorari in order to decide whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury.[1]

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[1] In *Parker* v. *North Carolina,* 397 U. S. 790, 798 (1970), the Court said: "Whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not

I

Respondent, a Negro, and two others were arrested by Tennessee authorities for the robbery of a Nashville liquor store and the attempted murder of an employee who was shot during the episode. Three weeks later the employee died, and a Davidson County grand jury subsequently returned a murder indictment against respondent. Respondent signed a confession admitting his involvement in the robbery and shooting.

At the time of his arrest, respondent was 20 years old and his formal education had terminated at the sixth grade level. He had no attorney when he signed the confession, but subsequently his mother retained counsel to represent him. The attorney's major effort appears to have been to arrange a form of plea bargain, whereby respondent would plead guilty to the murder charge and the sentence, although imposed by a petit jury, would be 99 years, rather than the ultimate penalty. Respondent initially expressed a desire to plead not guilty, but, apparently because of the evidence against him and the possibility that the death sentence might be imposed if he were convicted, he decided on the advice of his counsel to plead guilty. The plea was entered, and the agreed-upon sentence was imposed.

II

For nearly a hundred years it has been established that the Constitution prohibits a State from systematically excluding Negroes from serving upon grand juries that indict for crime and petit juries that try the factual issue of the guilt or innocence of the accused. *Strauder* v.

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decide," citing three decisions of the courts of appeals. All of these decisions dealt with the issue of whether grand jury exclusion might be raised on federal habeas after a plea of not guilty and trial by jury. That issue is left open by this opinion, as it was by *Parker*.

West Virginia, 100 U. S. 303, 309 (1880). See also *Virginia* v. *Rives,* 100 U. S. 313, 322–323 (1880). These holdings have been reaffirmed over the years, see, *e. g., Norris* v. *Alabama,* 294 U. S. 587 (1935), and *Pierre* v. *Louisiana,* 306 U. S. 354 (1939), and are not of course questioned here. But respondent's assertion of this claim has another dimension to it; it was made for the first time many years after he had pleaded guilty to the offense for which he was indicted by the grand jury. None of our previous decisions dealing with the constitutional prohibition against racial discrimination in the selection of grand jurors has come to us in the context of a guilty plea.[2]

In *Brady* v. *United States,* 397 U. S. 742, 750 (1970), *McMann* v. *Richardson,* 397 U. S. 759, 770 (1970), and *Parker* v. *North Carolina,* 397 U. S. 790 (1970), this Court dealt at some length with the effect of a plea of guilty on the later assertion of claimed violations of constitutional rights. In *Brady* v. *United States, supra,* at 750, 758, the Court said:

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[2] Cf. *Alexander* v. *Louisiana,* 405 U. S. 625 (1972); *Sims* v. *Georgia,* 389 U. S. 404 (1967); *Jones* v. *Georgia,* 389 U. S. 24 (1967); *Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Coleman* v. *Alabama,* 377 U. S. 129 (1964); *Arnold* v. *North Carolina,* 376 U. S. 773 (1964); *Eubanks* v. *Louisiana,* 356 U. S. 584 (1958); *Reece* v. *Georgia,* 350 U. S. 85 (1955); *Williams* v. *Georgia,* 349 U. S. 375 (1955); *Hernandez* v. *Texas,* 347 U. S. 475 (1954); *Avery* v. *Georgia,* 345 U. S. 559 (1953); *Cassell* v. *Texas,* 339 U. S. 282 (1950); *Patton* v. *Mississippi,* 332 U. S. 463 (1947); *Akins* v. *Texas,* 325 U. S. 398 (1945); *Hill* v. *Texas,* 316 U. S. 400 (1942); *Smith* v. *Texas,* 311 U. S. 128 (1940); *Pierre* v. *Louisiana,* 306 U. S. 354 (1939); *Hale* v. *Kentucky,* 303 U. S. 613 (1938); *Hollins* v. *Oklahoma,* 295 U. S. 394 (1935); *Norris* v. *Alabama,* 294 U. S. 587 (1935); *Martin* v. *Texas,* 200 U. S. 316 (1906); *Rogers* v. *Alabama,* 192 U. S. 226 (1904); *Tarrance* v. *Florida,* 188 U. S. 519 (1903); *Carter* v. *Texas,* 177 U. S. 442 (1900); *Williams* v. *Mississippi,* 170 U. S. 213 (1898); *Gibson* v. *Mississippi,* 162 U. S. 565 (1896); *Bush* v. *Kentucky,* 107 U. S. 110 (1883); *Neal* v. *Delaware,* 103 U. S. 370 (1881); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880).

> "The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.
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> . . . . .
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> "This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that

> they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth."

In *McMann* v. *Richardson, supra,* at 770–771, the Court laid down the general rule by which federal collateral attacks on convictions based on guilty pleas rendered with the advice of counsel were to be governed:

> "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." (Footnote omitted.)

The Court of Appeals in its opinion in this case expressed the view that *Brady, supra,* and *McMann, supra,* were not controlling, because, in its words:

> "The *Brady* line of cases dealt only with challenges to the guilty plea itself; no such challenge has been made here. For this reason alone we believe that *Brady* and its successors cannot govern our decision here." 459 F. 2d 237, 242 n. 5 (1972).[3]

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[3] A recent decision of the Fourth Circuit, *Parker* v. *Ross,* 470 F. 2d 1092 (1972), arrived at the conclusion we now reach by extending the reasoning of the *Brady* trilogy to the type of claim respondent seeks to assert.

The second sentence of the quoted passage does not appear in the cited report. It is contained, however, in the official opinion as issued by the Clerk of Court for the Sixth Circuit.

We think the Court of Appeals took too restrictive a view of our holdings in the *Brady* trilogy. In each of those cases the habeas petitioner alleged some deprivation of constitutional rights that preceded his decision to plead guilty. In *McMann, supra,* each of the respondents asserted that a coerced confession had been obtained by the State. In *Brady, supra,* the claim was that the burden placed on the exercise of the right to jury trial by the structure of the Federal Kidnaping Act, 18 U. S. C. § 1201—a burden which was held constitutionally impermissible in *United States* v. *Jackson,* 390 U. S. 570 (1968)—had motivated petitioner's decision to plead guilty. In *Parker, supra,* the claim was that a provision of that State's laws similar to that contained in 18 U. S. C. § 1201 had likewise motivated the guilty plea.

While the claims of coerced confessions extracted prior to the guilty plea in *McMann* were in a somewhat different posture than had they been made in attacking a jury verdict based in part upon such confessions, the claim of impermissible burden on the right to jury trial resulting from the structure of the Kidnaping Act and the North Carolina law, respectively, were not significantly different from what they would have been had they been made following a bench trial and judgment of conviction. But the Court in *Brady* and *Parker,* as well as in *McMann,* refused to address the merits of the claimed constitutional deprivations that occurred prior to the guilty plea. Instead, it concluded in each case that the issue was not the merits of these constitutional claims as such, but rather whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel.

There are no doubt factual and legal differences between respondent's present assertion of the claim of discriminatory selection of the members of a grand jury, and the assertion of the constitutional claims by the prisoners in the *Brady* trilogy. In the latter cases, the facts giving rise to the constitutional claims were generally known to the defendants and their attorneys prior to the entry of the guilty pleas, and the issue in this Court turned on the adequacy of the attorneys' advice in evaluating those facts as a part of the recommendation to plead guilty. In the instant case, the facts relating to the selection of the Davidson County grand jury in 1948 were found by the District Court and the Court of Appeals to have been unknown to both respondent and his attorney. If the issue were to be cast solely in terms of "waiver," the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here. But just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury.

III

We hold that after a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity. A state prisoner must, of course, prove that some constitutional infirmity occurred in the proceedings. But the inquiry does not end at that point, as the Court of Appeals apparently thought. If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson, supra,* at 771. Counsel's failure to evaluate properly facts giving rise to a constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof. Thus, while claims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, they are not themselves independent grounds for federal collateral relief.

We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*

A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. And just as it is not sufficient for the criminal defendant seeking to set aside such a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, *McMann, supra,* it is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.

The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution, see *Brady* v. *United States, supra,* at 751–752, or by contesting all guilt, see *Santobello* v. *New York,* 404 U. S. 257 (1971). A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported.

In order to obtain his release on federal habeas under these circumstances, respondent must not only establish the unconstitutional discrimination in selection of grand jurors, he must also establish that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the "range of competence demanded of attorneys in criminal cases."

Because we do not have before us all of the papers dealing with respondent's previous federal habeas petitions, we are not in a position to say whether he is presently precluded from raising the issue of the voluntary and intelligent nature of his guilty plea, or whether that claim would be open to him on appropriate allegations in a new or amended petition. The Court of Appeals was at pains to point out that respondent's present petition did not attack the guilty plea. In view of the reliance placed by the Court of Appeals and the District

Court in their respective opinions in this case upon the statement of the concurring judge in the Tennessee Court of Criminal Appeals that "[n]o lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948," the chances of respondent's being able to carry the necessary burden of proof in challenging the guilty plea would appear slim. Nonetheless, we prefer to have this issue, if it be open to respondent under federal habeas practice, first addressed by the District Court or by the Court of Appeals. Respondent was not at any rate entitled to release from custody solely by reason of the fact that the grand jury which indicted him was unconstitutionally selected, and the judgment of the Court of Appeals holding otherwise is reversed and remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I would affirm the judgment of the Court of Appeals. I am convinced that Henderson amply demonstrated that he is entitled to relief on any acceptable theory of voluntariness, right to effective assistance of counsel, or waiver, and that no further proceedings are necessary. The Court adopts an inflexible rule in a case where, as the Court of Appeals noted, the facts establish a need for flexibility. 459 F. 2d 237, 242 n. 5 (CA6 1962). In doing so, it disregards this Court's previous counsel that whether a defendant is to be precluded from establishing a claim that his constitutional rights have been infringed "must depend, in each case, upon the particular facts and circumstances surrounding that case," *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938).

The Court relies on the "guilty plea" trilogy, *Brady* v. *United States,* 397 U. S. 742 (1970), *McMann* v.

Richardson, 397 U. S. 759 (1970), and *Parker* v. *North Carolina*, 397 U. S. 790 (1970). In each of those cases the Court held that a guilty plea, intelligently and voluntarily made, barred the assertion of later claims that at some point in the pretrial process, an admission of guilt had been unconstitutionally extracted, either through a coerced confession or through a plea of guilty induced by fear of enhanced punishment if such a plea were not made. In *McMann*, the Court summarized the view of the criminal process underlying those cases, stating, "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." 397 U. S., at 770.

The Court today extends that holding, so that, even where counsel does not consider and present to his client the possibility of a challenge to the composition of the grand jury, the client is nonetheless held to have made an "intelligent" guilty plea. I think that this extension of the "guilty plea" trilogy is misconceived. Those cases were concerned with the practical consequences of overturning negotiated pleas of guilty simply on the ground that the defense may have misjudged the possibility of successfully raising constitutional challenges to the pretrial proceedings. The Court recognized the importance of plea bargaining to the administration of criminal justice. See, *e. g.*, *Brady* v. *United States*, *supra*, at 750-753. Promises of leniency, which the Court viewed as indistinguishable from the challenges in those cases, are used to induce defendants to forgo possibly meritorious challenges to the proceedings against them. This, the Court believed, permitted the imposition of punishment on offenders who deserved it, without significantly impairing the integrity of the criminal process by leaving unsanctioned all constitutional violations.

Whatever one may think of this analysis,[1] it is plainly premised on the notion of bargain and exchange: in return for relinquishing a constitutional challenge, the offender receives more lenient treatment. Clearly, that decision must be made by the defendant, for we would not let an attorney bargain away his client's rights.[2] It is the defendant who must, "with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Id.*, at 750. Yet nothing like that happened in this case. Henderson's attorney never presented to him the possibility that, by insisting upon indictment by a properly composed grand jury, he might secure a more favorable bargain. See App. 83, 96.

The opinion of the Court devotes most of its attention to assertions and reassertions that in all cases a guilty plea "may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge." But the majority gives us almost no reason why those assertions should be accepted, and, with respect, I cannot accept them.

The Court invokes the specter of requiring counsel to present to his client "every conceivable constitutional plea in abatement," suggesting, I suppose, that there are such a huge number of conceivable constitutional objections to the prosecution as to make such a requirement utterly impractical. I doubt that this accurately reflects the true situation; in most cases only one or two possibly meritorious objections to the prosecution can be made before trial. And, after all, these are objections bottomed on constitutional guarantees. I would have thought that the fact that the Constitution placed limits on the prosecution would be very important in deciding whether a lawyer's professional responsibility required him to consult with his client before taking action that led to a relinquishment of the constitutional objection. Surely *Brady* implied as much in saying that guilty pleas, because they operate as a waiver of constitutional rights, "must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances* and likely consequences," 397 U. S., at 748 (emphasis added). The Court today extends the holdings of the "guilty plea" trilogy without reference to the rationale by which those cases were reconciled with the requirements of the Constitution that a plea is a waiver of constitutional rights only where the defendant has been informed of those rights and decides not to invoke them in order to gain some advantage.

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[1] MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and I dissented in *McMann* and *Parker,* believing that guilty pleas were so prevalent that it did impair constitutional protections to permit a plea to bar challenges to the prosecution.

[2] Some of this Court's decisions suggest that an attorney's decision, in which the defendant does not participate, not to raise a constitutional objection may sometimes preclude successful reliance on the constitutional claim. See *Henry* v. *Mississippi,* 379 U. S. 443, 451 (1965); *Brookhart* v. *Janis,* 384 U. S. 1, 7–8 (1966). If such a rule is to be squarely adopted by this Court, it should be limited narrowly to situations in which practical realities bar consultation, as often may happen during the course of trial. Cf. *Murch* v. *Mottram,* 409 U. S. 41 (1972).

In the end, the Court seems to adopt a concept of professional responsibility that I cannot accept. It would let an attorney "advance" the interests of his client without even informing himself about the facts underlying a constitutional challenge so that he might inform the client about the way in which, in the attorney's professional judgment, the course he is taking in fact advances those interests. "[F]aithful representation of the interest of his client," *ante*, at 268, means, I believe, that an attorney must consult with the client fully on matters of constitutional magnitude. Without such consultation, the representation of criminal defendants becomes only another method of manipulating persons in situations where their control over their lives is precisely what is at stake.

If plea bargaining is to be constitutionally acceptable, it must rest upon personal choices made by defendants informed about possible alternatives; at least, they should know what options are open to them. In this case, Henderson might have secured a sentence shorter than 99 years by requiring the State to defend the constitutionality of its procedures for selecting grand juries. As is clear from this record, such a defense could not have succeeded, and the embarrassment of attempting a defense might well have led the prosecution to offer a more favorable bargain.[3] I find nothing in the opinion of the Court that persuades me that Henderson's attorney acted "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson, supra,* at 771, because he did not consult with his client on a matter about which consultation is required.

Petitioner suggests, however, that Henderson's attorney *may* have considered the possibility of challenging the indictment but rejected that course because he *believed* that the grand jury was in fact selected by procedures that conformed to constitutional requirements. There is only the barest support in the record for this contention,[4] and the District Judge explicitly found that no objection was made by counsel "quite simply, because the possibility never occurred to him." 342 F. Supp. 113, 115. But even if petitioner's suggestion were correct, it would not advance his cause. For then, as Judge Celebrezze aptly put it, the attorney's decision would have been "grossly inadequate in light of the clearly established constitutional law of the period." 459 F. 2d, at 242 n. 5.[5]

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[3] Even if the State successfully defended its procedures in a preliminary attack, or if it decided to institute proceedings anew by convening a new grand jury, Henderson would have secured time in which to prepare a better defense and in which passions over his offense might subside, so that a plea of not guilty might have been more attractive to him.

[4] In a hearing held in state court on Henderson's application for collateral relief, an affidavit from the attorney who had represented him was introduced. It stated in part, "I have never been aware of any irregularity in the method of selection of grand or petit juries,

Henderson was indicted in March 1948 by a grand jury in Davidson County, Tennessee.[6] Although Negroes constituted 25% of the population of the county in 1948, not a single Negro had served on the grand jury in the years before 1948.[7] In addition, whenever the name of a Negro appeared on the lists from which members of the grand jury were chosen, the letters "c" or "col" were marked next to the name. In the words of the Court of Appeals, "officials were thus provided with a simple means of determining which citizens might be appropriately 'excused' from grand jury duty. It is apparent from the absence of any Negroes on the grand jury panels that the means were used and the impermissible end of exclusion accomplished." 459 F. 2d, at 239 n. 2.

Two points about these facts must be emphasized. First, the law was clear in 1948 that it was extremely difficult for a State to establish that it did not unconstitutionally exclude Negroes from service on the grand jury if no Negroes in fact served and a method of selection was used

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particularly in regard to systematic exclusion of members of any race . . . ." App. 96.

[5] In this regard the strictures in *McMann* v. *Richardson*, 397 U. S. 759, 772–773 (1970), against assessing decisions by counsel in the light of subsequent developments in the law have no force.

[6] Davidson County includes the city of Nashville.

[7] The first Negro to serve on the Davidson County grand jury was selected in 1953.

that brought to the attention of the persons selecting the grand jury the race of potential grand jurors. See, *e. g., Patton* v. *Mississippi,* 332 U. S. 463, 466 (1947); *Hill* v. *Texas,* 316 U. S. 400 (1942); *Smith* v. *Texas,* 311 U. S. 128 (1940). It was therefore relatively easy to assess whether, if an attorney could present that kind of evidence, a constitutional challenge to the indictment was likely to succeed. Thus, making the decision to challenge the grand jury is different from making the decision to challenge a confession as coerced or a search as unreasonable. The latter decision, as the Court emphasized in *McMann* v. *Richardson, supra,* at 769–770, often turns upon predictions about how certain facts will be viewed by a court attempting to apply largely unstructured tests of reasonableness or voluntariness under all the circumstances. I would therefore accord less weight to the fact that an attorney must make professional judgments in cases like this one than in cases like *McMann,* in line with the difference in the ease with which such judgments can confidently be made.

Second, it takes almost no inquiry at all to determine whether any Negroes had served on local grand juries and whether racial designations appeared on the lists from which grand jurors were chosen. In its quest to establish a general rule applicable to all cases of challenges to the composition of grand juries, the Court disregards this fact. Instead, it characterizes the problem as involving "amass[ing] a large quantum of factual data" and "elaborate consideration of whether pleas in abatement . . . might be factually supported." *Ante,* at 268. Whatever might be the situation in other cases, the facts in this case show that no large amounts of data or elaborate consideration is involved. That is enough to demonstrate the fallacy of the Court's attempt to define a broad general rule. I would adhere to tests that turn on the facts of each case. Cf. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938).

The Court suggests that the failure by Henderson's attorney to consider the possibility of a constitutional challenge may be excused because, in the words of a judge of the Tennessee Court of Criminal Appeals, 3 Tenn. Crim. App. 204, 211, 459 S. W. 2d 176, 179 (1970), "No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948." That statement is simply untrue. Even cursory research has disclosed several cases at the appellate level in which such challenges were raised by local attorneys. *Kennedy* v. *State,* 186 Tenn. 310, 210 S. W. 2d 132 (1947); *Williamson* v. *State,* 194 Tenn. 341, 250 S. W. 2d 556 (1952);[8] *Beckett* v. *United States,* 84 F. 2d 731 (CA6 1936). It may well be that Henderson "received the same advice on this point [that is, none at all] that he would have received from most other lawyers in Tennessee in 1948." 459 F. 2d, at 242 n. 6. That should not exonerate Henderson's attorney, though; it reflects, as Judge Celebrezze said, "a too-long tolerated gap between the requirements of the Constitution and realities of Tennessee Criminal practice." *Ibid.* Determination of whether counsel is competent should not turn on the fact that many attorneys in a particular place at a given time would not think of raising certain claims. The test must be whether the advice was competent in light of the law of the time,[9] and without regard to local peculiarities. Cf. *United States ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71, 82 (CA5 1959); *Windom* v. *Cook,* 423 F. 2d 721 (CA5 1970).

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[8] The offense in this case occurred in 1949; the report does not indicate when the trial commenced. In its opinion, the Tennessee Supreme Court noted that "some months ago this Court reversed a conviction . . . because *no* members of the colored race were summoned for jury service." 194 Tenn. 341, 346, 250 S. W. 2d 556, 558 (1952) (emphasis added).

[9] Including, of course, consideration of recent trends that might suggest fruitful attempts to raise claims rejected in decisions whose

If Henderson's attorney had had even a passing acquaintance with the Tennessee Supreme Court's decision in *Kennedy* v. *State, supra,* a decision plainly relevant to Henderson's situation and recently decided, he would have immediately noticed that he had a very strong case. The Tennessee Supreme Court held that Kennedy had failed to prove his claim of unconstitutional discrimination in the selection of grand jurors. The court emphasized that the jury commissioners in Maury County selected names from tax books that "contained no identifying symbols whereby the race of any taxpayer might be known," and that 10 persons of 109 summoned for jury service were Negroes. 186 Tenn., at 316, 210 S. W. 2d, at 134. An attorney of minimal competence would have realized that, where no Negroes had been summoned for service over many years and where racial designations were used, the Tennessee Supreme Court would very probably have held the selection system unconstitutional, in line with the decisions of this Court.[10]

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rationale has been undermined by later decisions. Cf. *Tehan* v. *Shott,* 382 U. S. 406 (1966); *Milton* v. *Wainwright,* 407 U. S. 371, 381–382 (STEWART, J., dissenting).

[10] Notwithstanding these differences between *Kennedy* and this case, petitioner suggests that it would have been "an exercise in futility" to have challenged the composition of the grand jury in this case. Brief for Petitioner 12. I would not lightly assume that a State's highest court would disregard clear holdings, consistently reiterated, of this Court. But even if petitioner's assessment is correct, it would further undercut extending the rationale of the "guilty plea" trilogy to this case. As I have said above, plea bargaining rests on an exchange. If the State refuses to acknowledge that it may have something to lose, by taking the position that state courts would fail to apply established constitutional standards to

I believe that the Court today adopts a rule that does not reflect the variety of circumstances in which claims like Henderson's arise. The Court's rule is particularly inappropriate in this very case. I therefore dissent.

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undisputed facts, no bargain is possible. In such a case, even on the rationale of the "guilty plea" cases, the plea would be involuntary.

Petitioner's suggestion is of course premised on an estimate of how a competent attorney would have assessed the chances of prevailing on the constitutional challenge. Since Henderson's attorney made no such assessment anyway, the suggestion has no relevance to this case.

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. v. DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1021. Argued January 15, 1973—Decided April 18, 1973

Petitioners, employees of state health facilities, brought suit for overtime pay due them under § 16 (b) of the Fair Labor Standards Act (FLSA) and damages, which the District Court dismissed as being an unconsented action against the State of Missouri and thus barred by the Eleventh Amendment. The Court of Appeals affirmed. *Held:* Although amendments to the FLSA in 1966 extended statutory coverage to state employees, the legislative history discloses no congressional purpose to deprive a State of its constitutional immunity to suit in a federal forum by employees of its nonprofit institutions, particularly since Congress made no change in § 16 (b), which makes no reference to suits by employees against the State. *Parden* v. *Terminal R. Co.,* 377 U. S. 184, distinguished. The amendments' extension of coverage to state employees is not without meaning as the Secretary of Labor is thereby enabled to bring remedial action on their behalf under § 17 of the FLSA. Pp. 281-287.

452 F. 2d 820, affirmed.

Douglas, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, Powell, and Rehnquist, JJ., joined. Marshall, J., filed an opinion concurring in the result, in which Stewart, J., joined, *post,* p. 287. Brennan, J., filed a dissenting opinion, *post,* p. 298.

A. L. Zwerdling argued the cause for petitioners. With him on the brief were *Charles R. Oldham* and *George Kaufmann.*

Charles A. Blackmar, Assistant Attorney General of Missouri, argued the cause for respondents. With him on the brief was *John C. Danforth,* Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Griswold* and *Richard F. Schubert*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Eleventh Amendment, adopted in 1795, and formally ratified in 1798, provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment is the basis of a motion by Missouri to dismiss a complaint filed by employees of state agencies of that State, the Department of Public Health and Welfare, and two of its divisions, the Division of Mental Disease and the Division of Health, and various officials of the Department and of the two Divisions.

Although the Eleventh Amendment is not literally applicable since petitioners who brought suit are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. See *Hans* v. *Louisiana,* 134 U. S. 1; *Duhne* v. *New Jersey,* 251 U. S. 311; *Parden* v. *Terminal R. Co.,* 377 U. S. 184;[1] C. Jacobs, The Eleventh Amendment and Sovereign Immunity 109–110 (1972).

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[1] The dissent argues that "*Parden* held that a federal court determination of such suits cannot be precluded by the doctrine of sovereign immunity because the States surrendered their sovereignty to that extent when they granted Congress the power to regulate commerce." *Post,* at 299. But, the plain language of the Court's

The employees seek overtime compensation due them under § 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U. S. C. § 216 (b), and an equal amount as liquidated damages and attorneys' fees. The District Court dismissed the complaint. The Court of Appeals, sitting in a panel of three, reversed, one judge dissenting. No. 20,204, Apr. 2, 1971 (not reported). On the filing of a petition for rehearing, the Court of Appeals sat *en banc* and by a closely divided vote set aside the panel decision and affirmed the judgment of the District Court. 452 F. 2d 820. The case is here on a petition for a writ of certiorari which we granted. 405 U. S. 1016.

The panel of three thought the present case was governed by *Parden* v. *Terminal R. Co., supra.* The court sitting *en banc* thought *Parden* was distinguishable. That is the central issue argued in the present case.

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opinion in *Parden* belies this assertion. For example, the Court stated:

"Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overridden. It remains the law that a State may not be sued by an individual without its consent." 377 U. S. 184, 192. The Court then repeated that "[a] State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court." *Id.,* at 196. As we read these passages, and clearly as the dissent in *Parden* read them, *id.,* at 198, they dealt with constitutional constraints on the exercise of the federal judicial power. Moreover, if *Parden* was concerned merely with the surrender of common-law sovereign immunity when the States granted Congress the power to regulate commerce, it would seem unnecessary to reach the question of waiver or consent, for Congress could subject the States to suit by their own citizens whenever it was deemed necessary or appropriate to the regulation of commerce. No more would be required. But, there can be no doubt that the Court's holding in *Parden* was premised on the conclusion that Alabama, by operating the railroad, had consented to suit in the federal courts under FELA. *Id.,* at 186.

Parden involved a state-owned railroad operating in interstate commerce; and the claims were those of employees under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.* The term carrier for purposes of that Act was defined by Congress as including "[e]very common carrier by railroad while engaging in commerce between any of the several States." *Id.,* § 51. The Court concluded that Congress designed to bring state-owned, as well as privately owned, carriers within that definition and that it was empowered to do so by the Commerce Clause. The State's operation of its railroad in interstate commerce, it held, was in subordination to the power of Congress to regulate interstate commerce and application of the FELA to a State in those circumstances was not precluded by sovereign immunity. 377 U. S., at 191–193. The *Parden* case in final analysis turned on the question of waiver, a majority of the Court holding that it was a federal question since any consent of the State to suit did not arise from an act "wholly within its own sphere of authority" but in the area of commerce, which is subject to pervasive federal regulation. *Id.,* at 196.

It is said that the Fair Labor Standards Act (FLSA) stands on the same foundation, reflecting the power of Congress to regulate conditions of work of those producing goods for commerce, *United States* v. *Darby,* 312 U. S. 100, and those whose activities are necessary to the production of goods for commerce. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524. By § 3 (d) of the Act, "employer" was first defined to exclude the United States or any State or political subdivision of a State. But in 1966 there was added to § 3 (d) an "except" clause which reads "except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section . . . ." Section 3 (r) was amended at the same time to include: "the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit) . . . ." Identical language was also added in 1966 to subsection 3 (s), which defines "[e]nterprise engaged in commerce or in the production of goods for commerce."

By reason of the literal language of the present Act, Missouri and the departments joined as defendants are constitutionally covered by the Act, as the Court held in *Maryland* v. *Wirtz,* 392 U. S. 183. The question is whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court—a question we reserved in *Maryland* v. *Wirtz, supra,* at 199–201.

There is no doubt that Congress desired to bring under the Act employees of hospitals and related institutions. S. Rep. No. 1487, 89th Cong., 2d Sess., 8, 22–23; H. R. Rep. No. 1366, 89th Cong., 2d Sess., 3, 11–12, 15, 16–17, 18. But § 16 (b) remained the same. Prior to 1966 and afterward, it read in relevant part:

> "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction . . . ."

The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State. *Parden* involved the railroad business which Alabama operated "for profit." 377 U. S., at 185. *Parden* was in the area where private persons and corporations normally ran the enterprise.

State mental hospitals, state cancer hospitals, and training schools for delinquent girls which are not operated for profit are not proprietary. "Before 1810, only a few eastern-seaboard states had incorporated private institutions to care for the mentally ill, and Virginia alone had established a public asylum." D. Rothman, The Discovery of the Asylum 130 (1971). But, as Rothman relates, after that the public sector took over.[2]

Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. Congress, acting responsibly, would not be presumed to take such action silently. The dramatic circumstances of the *Parden* case, which involved a rather isolated state activity can be put to one side. We deal here with problems that may well implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy. Those who follow the teachings of *Kirschbaum* v. *Walling, supra,* and see its manifold applications will appreciate how pervasive such a new federal scheme of regulation would be.

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[2] "Few departures from colonial practices occurred in the first forty years after independence; the insane commonly languished in local jails and poorhouses or lived with family and friends. But in the course of the next few decades, in a dramatic transformation, state after state constructed asylums. Budding manufacturing centers like New York and Massachusetts erected institutions in the 1830's, and so did the agricultural states of Vermont and Ohio, Tennessee and Georgia. By 1850, almost every northeastern and midwestern legislature supported an asylum; by 1860, twenty-eight of the thirty-three states had public institutions for the insane. Although not all of the mentally ill found a place within a hospital, and a good number among the aged and chronic poor remained in almshouses and jails, the institutionalization of the insane became the standard procedure of the society during these years. A cult of asylum swept the country." *Ibid.*

But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts. The *Parden* opinion did state that it would be "surprising" to learn that Congress made state railroads liable to employees under the FELA, yet provided "no means by which that liability may be enforced." 377 U. S., at 197. It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old § 16 (b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

By holding that Congress did not lift the sovereign immunity of the States under the FLSA, we do not make the extension of coverage to state employees meaningless. Cf. *Parden* v. *Terminal R. Co., supra,* at 190. Section 16 (c) gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA. Once the Secretary acts under § 16 (c), the right of any employee or employees to sue under § 16 (b) terminates. Section 17 gives the Secretary power to seek to enjoin violations of the Act and to obtain restitution in behalf of employees. Sections 16 and 17 suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States. For suits by the United States against a State are not barred by the Constitution. See *United States* v. *Mississippi*, 380 U. S. 128, 140–141. In this connection, it is not amiss to note that § 16 (b) allows recovery by employees, not only of the amount of unpaid wages, but of an equal amount as liquidated damages and attorneys' fees. It is one thing, as in *Parden*, to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly. The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor.

The Solicitor General, as *amicus curiae*, argues that *Hans* v. *Louisiana*, 134 U. S. 1, should not be construed to apply to the present case, his theory being that in *Hans* the suit was one to collect on coupons attaching to state bonds, while in the instant case the suit is a cause of action created by Congress and contained in § 16 (b) of the Act. It is true that, as the Court said in *Parden*, "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." 377 U. S., at 191. But we decline to extend

Parden to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear.

We are told that the FLSA in 1971 covered 45.4 million employees and nearly 2 million establishments, and that 2.7 million of these employees and 118,000 of these establishments were in state or local government employment. We are also told that less than 4% of these establishments can be investigated by the Secretary of Labor each year. The argument is that if we deny this direct federal court remedy, we in effect are recognizing that there is a right without any remedy. Section 16 (b), however, authorizes employee suits in "any court of competent jurisdiction." Arguably, that permits suit in the Missouri courts but that is a question we need not reach. We are concerned only with the problem of this Act and the constitutional constraints on "the judicial power" of the United States.

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, concurring in the result.

I believe that proper analysis of whether these employees may sue their state employer in federal court for overtime compensation owed to them under the Fair Labor Standards Act[1] requires consideration of what I view as two distinct questions: (1) did Congress, in extending the protection of the FLSA to state employees such as these petitioners, effectively lift the State's protective veil of sovereign immunity; and (2) even if Congress did lift the State's general immunity, is the exercise of federal judicial power barred in the context of this case in light of Art. III and the Eleventh Amendment? Portions of the Court's opinion convey the impression that these questions are but a single issue.[2] I do not agree.

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[1] 29 U. S. C. §§ 201-219.

Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence.[3] While the present-day immunity of a State from suit by its own citizens or by citizens of another State in the absence of consent obviously cannot be justified on the common-law rationale that "the King can do no wrong," the principle has been said to be applicable to the States because of "[t]he inherent nature of sovereignty," *Great Northern Life Insurance Co.* v. *Read,* 322 U. S. 47, 51 (1944). See also *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353 (1907).

The common-law doctrine of sovereign immunity in its original form stood as an absolute bar to suit against a State by one of its citizens, absent consent. But that doctrine was modified *pro tanto* in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our Union was formed, the States, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress. This is one of the essential lessons of the decision in *Parden* v. *Terminal R. Co.,* 377 U. S. 184, 192 (1964), where the Court recognized that "[b]y empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." Congress having validly exercised its power under the Commerce Clause to extend the protection of the FLSA to state employees such as petitioners, see *Maryland* v. *Wirtz,* 392 U. S. 183 (1968), the State may not defeat this suit by retreating behind its common-law shield of sovereign immunity.

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[2] See *ante,* at 285.

[3] See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 2–21 (1963).

Insofar as the Court may now be suggesting that the Congress has not effectively lifted the State's immunity from private suit in the context of the FLSA, I cannot agree. In the 1966 amendments, § 3 (d), 29 U. S. C. § 203 (d), which defines "employer" for the purposes of the FLSA was altered to cover expressly "employees of a State, or a political subdivision thereof, employed . . . in a hospital, institution, or school . . . ."[4] In the face of such clear language, I find it impossible to believe that Congress did not intend to extend the *full benefit* of the provisions of the FLSA to these state employees.[5] It is true—as the Court points out—that in 1966 Congress did not amend § 16 (b) of the Act, 29 U. S. C. § 216 (b), which provides for private suit by the "employee" against the "employer" to recover unpaid compensation. But this is readily explained by the fact that no amendment to the language of § 16 (b) was necessary to make the desired extension to state employees; the alteration of the definition of "employer" in § 3 (d) clearly sufficed to achieve Congress' purpose[6] and to express its will. Indeed, to suggest that § 16 (b) may not provide for suit by state employees, despite the alteration of § 3 (d) to include state employers, ignores the basic canon of statutory construction that different provisions of the same statute normally should be construed consistently with one another. See, *e. g., Clark* v. *Uebersee Finanz-Korporation, A. G.,* 332 U. S. 480, 488 (1947); *Markham* v. *Cabell,* 326 U. S. 404, 410-411 (1945); *Ex parte Public National Bank,* 278 U. S. 101, 104 (1928).

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[4] See also § 3 (r), 29 U. S. C. § 203 (r).

[5] See also S. Rep. No. 1487, 89th Cong., 2d Sess., 8 (1966), which described one of the purposes of the 1966 amendments as being "to make plain the intent to bring under the *coverage of the act* employees of hospitals and related institutions, schools for physically or mentally handicapped or gifted children, or institutions of higher education, whether or not any of these hospitals, schools, or institutions are *public or private* or operated for profit or not for profit." (Emphasis added.)

There remains, though, the question, where may these petitioners enforce against the State their congressionally created rights under the FLSA? Section 16 (b) authorizes employee suits "in any court of competent jurisdiction." Has Congress thus successfully compelled the State in this case to submit to employee suits in federal court?

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

On its face the Amendment, of course, makes no mention of a citizen's attempt to sue his own State in federal court, the situation with which we deal here. Nevertheless, I believe it clear that the judicial power of the

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[6] Section 16 (b), 29 U. S. C. § 216 (b), provides in relevant part: "Any employer who violates the provisions of . . . this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

United States does not extend to suits such as this, absent consent by the State to the exercise of such power. This question was first considered in *Hans* v. *Louisiana,* 134 U. S. 1 (1890), where a federal court action was brought against a State by one of its citizens who claimed that it had unconstitutionally repudiated certain debt obligations in violation of the Contract Clause of Art. I, § 10. Mr. Justice Bradley, speaking for the Court, observed that the suit was "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of," and he then asked:

> "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?" *Id.,* at 15.

The Court rejected such a suggestion in *Hans,* and it has continued to do so ever since. See *Duhne* v. *New Jersey,* 251 U. S. 311 (1920); *Fitts* v. *McGhee,* 172 U. S. 516, 524–525 (1899); *North Carolina* v. *Temple,* 134 U. S. 22 (1890).

The root of the constitutional impediment to the exercise of the federal judicial power in a case such as this is not the Eleventh Amendment but Art. III of our Constitution. Following the decision in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), in which this Court held that federal jurisdiction encompassed a suit brought against a nonconsenting State by citizens of another State, the Eleventh Amendment was introduced to clarify the intent of the Framers concerning the reach of the federal judicial power. See, *e. g., Hans* v. *Louisiana,* 134 U. S., at 11–14. It had been widely understood prior to ratification of the Constitution that the provision in Art. III, § 2, concerning "Controversies . . . between a State and Citizens of another State" would not provide a mechanism for making States unwilling defendants in federal court.[7] The Court in *Chisholm,* however, considered the plain meaning of the constitutional provision to be controlling. The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm,* and, more generally, to restore the original understanding, see, *e. g., Hans* v. *Louisiana, supra,* at 11–15. Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and "it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification," *Ex parte New York, No. 1,* 256 U. S. 490, 497 (1921); see *Smith* v. *Reeves,* 178 U. S. 436, 447–449 (1900).[8]

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[7] See The Federalist No. 81 (Hamilton); *Hans* v. *Louisiana,* 134 U. S. 1, 12–14 (1890); 1 C. Warren, The Supreme Court in United States History 91 (Rev. Ed. 1937); Cullison, Interpretation of the Eleventh Amendment, 5 Houston L. Rev. 1, 6–9 (1967).

[8] My Brother BRENNAN, in dissent, suggests that this case involves only a question of sovereign immunity and does not involve any question as to the limits of the federal judicial power under Art. III and the Eleventh Amendment. He considers this theory to be entirely consistent with the Court's seminal decision in *Hans* v. *Louisiana, supra.* As already indicated, there the private party attempted to sue his own State in federal court on the basis of the Contract Clause, not on the basis of a congressionally created cause of action. The Court concluded that the State was immune from such a suit in federal court, absent consent. Apparently, my Brother BRENNAN'S view is that the result in *Hans* was due to the

This limitation upon the judicial power is, without question, a reflection of concern for the sovereignty of the States, but in a particularly limited context. The

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fact that, unlike the present case, nothing had occurred to lift the State's common-law immunity. But such a reading seems to me at odds with his theory that at the time the Union was formed the States surrendered that portion of their sovereignty which conflicted with the supreme federal powers. For if the only relevant issue in *Hans* was the State's common-law immunity, such a view would seem to compel the conclusion that the States had also *pro tanto* surrendered their common-law immunity with respect to any claim under the Contract Clause. After all, the only difference between the Contract Clause and congressionally created causes of action is that the Contract Clause is self-enforcing, see, *e. g., Sturges* v. *Crowninshield,* 4 Wheat. 122, 197–200 (1819); it requires no congressional act to make its guarantee enforceable in a judicial suit. It seems to me a strange hierarchy that would provide a greater opportunity to enforce congressionally created rights than constitutionally guaranteed rights in federal court. Yet my Brother BRENNAN, given his theory of waiver of common-law immunity plus his theory that no constitutional limitation upon the exercise of the federal judicial power exists in the context of a suit brought against a State by one of its citizens, is forced either to this anomalous position or else to the admission that *Hans* was incorrectly decided. He apparently chooses the former.

However, if the issue of the limits of the judicial power, as well as of common-law immunity, is considered to be relevant in cases such as *Hans* and this case, the decision in *Hans* is sensibly understood as resting on the former basis alone. For, although the State's common-law immunity may have been no defense to a Contract Clause claim, the State had not consented to suit in federal court and therefore it was not susceptible to the exercise of the federal judicial power—regardless of the source of the federal claim. Thus, there seems to me little basis for doubting that *Hans* rested upon considerations as to constitutional limitations on the reach of the federal judicial power, a view confirmed by the decision's lengthy analysis of the constitutional debates surrounding Art. III, see 134 U. S., at 12–14, and by subsequent decisions of this Court, see, *e. g., Ex parte New York, No. 1,* 256 U. S. 490, 497 (1921); *Duhne* v. *New Jersey,* 251 U. S. 311, 313 (1920); *Georgia Railroad & Banking Co.* v. *Redwine,* 342 U. S. 299, 304 n. 13 (1952).

issue is not the general immunity of the States from private suit—a question of the common law—but merely the susceptibility of the States to suit before federal tribunals. Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this.[9]

At the same time, it is well established that a State may consent to federal suit and submit to the exercise of federal jurisdiction over it.[10] See, *e. g., Petty* v. *Tennes-*

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[9] Of course, suits brought in federal court against state officers allegedly acting unconstitutionally present a different question, see *Ex parte Young,* 209 U. S. 123 (1908). Likewise, suits brought in federal court by the United States against States are within the cognizance of the federal judicial power, for "[t]he submission to judicial solution of controversies arising between these two governments, 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' . . . but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty," *United States* v. *Texas,* 143 U. S. 621, 646 (1892). See also *United States* v. *North Carolina,* 136 U. S. 211 (1890). Moreover, it is unavoidable that in a suit between a State and the United States one sovereign will have to appear in the courts of the other.

[10] My Brother BRENNAN argues in his dissent that recognition of a State's power to consent to suit in federal court is inconsistent with any view that the impediment to private federal court suits against a State has constitutional roots in the limited nature of the federal judicial power. He is, of course, correct when he points out that, as a rule, power to hear an action cannot be conferred on a federal court by consent. And, it may be that the recognized power of States to consent to the exercise of federal judicial power over them is anomalous in light of present-day concepts of federal jurisdiction. Yet, if this is the case, it is an anomaly that is well established as a part of our constitutional jurisprudence. For there are decisions by this Court—including at least one joined by my Brother BRENNAN—clearly holding that constitutional limitations

see-Missouri Bridge Comm'n, 359 U. S. 275, 276 (1959); *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273, 284 (1906); *Clark* v. *Barnard,* 108 U. S. 436, 447 (1883). The issue, then, is whether the State has consented to this suit by its employees under the FLSA.

In *Parden* v. *Terminal R. Co., supra,* this Court found that Alabama which had undertaken the operation of an

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upon the exercise of the federal judicial power over private suits brought against a State may be waived by the State.

Thus, in *Clark* v. *Barnard,* 108 U. S. 436, 447 (1883), the Court rejected Rhode Island's argument that a claim made against it in federal court by a Connecticut corporation was specifically barred by the Eleventh Amendment in light of the fact that initially the State voluntarily intervened in the action to assert a claim of its own and thereby consented. Similarly, in *Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U. S. 275 (1959), which involved a tort suit brought in federal court by a resident of Tennessee (see 254 F. 2d 857, 862 (CA8 1958)) against a bi-state corporation formed by Missouri and Tennessee, the Court treated the suit as one against the States, but rejected their argument that the suit was prohibited by the Eleventh Amendment. The Court found that the States had waived their immunity from federal court suit in the compact by which the bi-state corporation was formed. Given the citizenship of the plaintiff in *Petty,* my Brother BRENNAN, with his literalist view of the Eleventh Amendment, might say that as to Tennessee there was no issue of constitutional magnitude and that the State had simply waived its common-law immunity. But insofar as Missouri was also held to have consented to federal court suit, the Court necessarily dealt with the limits of the federal judicial power since, as to Missouri, the suit was within the literal language of the Eleventh Amendment. See also *Missouri* v. *Fiske,* 290 U. S. 18 (1933). In short, I cannot accept my Brother BRENNAN's literalist approach to the Eleventh Amendment in light of prior decisions, and certainly his position is not aided by the clearly erroneous suggestion that any constitutional limitation on the exercise of the federal judicial power over private suits against States would constitute an absolute bar to the prosecution of such suits in federal court.

interstate railroad had consented to suits brought in federal court by its railroad employees under the Federal Employers' Liability Act, 45 U. S. C. §§ 51-60. As to the State's suability in federal court, the Court reasoned that "Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." 377 U. S., at 192. For me at least, the concept of implied consent or waiver relied upon in *Parden* approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver. Cf. *D. H. Overmyer Co.* v. *Frick Co.,* 405 U. S. 174, 185-186 (1972); *Fay* v. *Noia,* 372 U. S. 391, 439 (1963); *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). Certainly, the concept cannot be stretched sufficiently further to encompass this case. Here the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or "consenting" to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. Cf. *Marchetti* v. *United States,* 390 U. S. 39, 51-52 (1968). In *Parden,* Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too onerous or offensive. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit. Thus, I conclude that the State has not voluntarily consented to the exercise of federal judicial power over it in the context of this case.[11]

This is not to say, however, that petitioners are without a forum in which personally to seek redress against the State.[12] Section 16 (b)'s authorization for employee suits to be brought "in any court of competent jurisdiction" includes state as well as federal courts. See *Iowa Beef Packers, Inc.* v. *Thompson,* 405 U. S. 228 (1972). As I have already noted, Congress has the power to lift the State's common-law immunity from suit insofar as that immunity conflicts with the regulatory authority conferred upon it by the Commerce Clause. Congress has done so with respect to these state employees in its

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[11] Whether I would reach a different conclusion with respect to a case of this character if the State had commenced operation of the relevant facilities after passage of the 1966 amendments is a question that I need not now decide. Certainly, I do not accept the Court's efforts to distinguish this case from *Parden* on the basis that there we dealt with a "proprietary" function, whereas here we deal with a "governmental" function. See *ante,* at 284–285. I had thought we had escaped such unenlightening characterizations of States' activities. Cf. *Maryland* v. *Wirtz,* 392 U. S. 183, 195 (1968); *United States* v. *California,* 297 U. S. 175, 183–184 (1936).

[12] Unlike the Court, I would not pretend to suggest that the power given the Secretary of Labor in § 17 of the FLSA, 29 U. S. C. § 217, to seek restitution on behalf of employees provides an adequate mechanism for safeguarding the interests of state employees such as petitioners. The United States, as *amicus curiae,* points out:

"In 1971, . . . the [FLSA] covered 45.4 million employees and nearly 2 million establishments; 2.7 million of these employees and 118,000 of these establishments were in the sector of state and local government employment, including state schools and hospitals. Yet, less than 4 percent of these establishments can be investigated by the Secretary each year." Brief for United States as *Amicus Curiae* 22–23 (footnotes omitted).

It is obviously unrealistic to expect Government enforcement alone to be sufficient.

1966 amendments to the FLSA; by those amendments, Congress created in these employees a federal right to recover from the State compensation owing under the Act. While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. See *Testa* v. *Katt,* 330 U. S. 386 (1947). See also *General Oil Co.* v. *Crain,* 209 U. S. 211 (1908). For Missouri has courts of general jurisdiction competent to hear suits of this character,[13] and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution, see *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 339–340 (1816). Thus, since federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy, see *Testa* v. *Katt, supra,* at 392–394; *Second Employers' Liability Cases,* 223 U. S. 1, 57–58 (1912).

I see our decision today, then, as nothing more than a regulation of the forum in which these petitioners may seek a remedy for asserted denial of their rights under the FLSA. At first blush, it may seem hypertechnical to say that these petitioners are entitled personally to enforce their federal rights against the State in a state forum rather than in a federal forum. If that be so, I think it is a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism.

MR. JUSTICE BRENNAN, dissenting.

I dissent. *Parden* v. *Terminal R. Co.,* 377 U. S. 184 (1964), compels reversal of the judgment of the Court of Appeals in this case and neither the Court's opinion nor my Brother MARSHALL's opinion concurring in the result is persuasive that it does not.

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[13] See Mo. Rev. Stat. § 478.070 (2) (1959).

I

Essentially, the Court purports only to distinguish *Parden*. There is, of course, the distinction that the lawsuits were brought under different statutes. The lawsuit in *Parden* was brought under the Federal Employers' Liability Act (FELA), 45 U. S. C. §§ 51–60, against the State of Alabama, owner and operator of a railroad engaged in interstate commerce, by citizens of Alabama in the employ of the railroad. The suit in the present case was brought under § 16 (b) of the Fair Labor Standards Act (FLSA), 29 U. S. C. §§ 201–219, as amended in 1966, Pub. L. 89–601, 80 Stat. 830, against the State of Missouri, operator of hospitals and other institutions covered by that Act, by citizens of Missouri employed in such institutions. But the lawsuits have in common that each is an action for damages in federal court brought against a State by citizens of the State in its employ under the authority of a regulatory statute founded on the Commerce Clause. *Parden* held that a federal court determination of such suits cannot be precluded by the doctrine of sovereign immunity because the States surrendered their sovereignty to that extent when they granted Congress the power to regulate commerce. 377 U. S., at 191. That holding fits precisely this FLSA lawsuit and compels reversal of the judgment of the Court of Appeals. I turn, then, to the reasons for my disagreement with the arguments upon which the Court rests its contrary conclusion.

Parden presented a question of first impression, namely, whether a State's operation of a congressionally regulated enterprise in interstate commerce has the consequence, without more, that the State becomes subject to a congressionally imposed condition of amenability to suit, or whether that consequence should follow only when Congress has expressly declared that any State which undertakes regulable conduct will be deemed thereby to have waived its immunity. *Parden* held that by operating the railroad, Alabama became amenable to suits under the FELA. *Parden* is distinguished on the ground that, whatever may have been the case of a suit under the FELA, in this suit under the FLSA the State may assert the defense of sovereign immunity unless Congress has foreclosed its assertion by clear language in the statute. But that very argument was rejected in *Parden* when advanced by the dissenters there as the principle that should control in all these cases. For the *Parden* dissent also argued that the immunity had not been surrendered when the States formed the Constitution and should be disallowed "[o]nly when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity . . . ." 377 U. S., at 198–199. In rejecting that argument, *Parden* held that the States had surrendered the protection of sovereign immunity in federal court suits authorized by Congress pursuant to the States' grant to Congress of the commerce power. Thus, under *Parden,* there can exist no basis for today's inquiry "whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court," *ante,* at 283, since *Parden* held that, because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver. There can be room for such inquiry only upon acceptance of the rejected premise underlying the *Parden* dissent, namely, that the States in forming the Union did not surrender their immunity as such to that extent, but only subjected their immunity to congressional control.

The Court's rejection of that premise is explicit in *Parden's* holding that:

> "By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit." 377 U. S., at 192.

In other words, the *Parden* holding, although perhaps not unambiguously phrased, was that when Congress conditions engagement in a regulated interstate enterprise upon amenability to suit, States that engage in such enterprise do not have the protection of sovereign immunity in suits in federal court arising from their engagement, because by surrendering their immunity to that extent when they granted Congress the commerce power, the States in effect agreed that Congress might subject them to suits in federal court arising out of their engagement in enterprises regulated by Congress in statutes such as the FELA and the FLSA.

However, even on the Court's premise that the grant to Congress of the commerce power did no more than empower Congress expressly to disallow the immunity, Congress must be taken to have disallowed it in § 16 (b) suits since Congress plainly stated its intention in enacting the 1966 amendments to put the States "on the same footing as other employers" in such suits. Since *Parden* had been decided two years before the amendments were adopted, Congress understandably had no reason expressly to declare the disallowance since no immunity existed to be disallowed. But Congress' intention to make the States amenable to § 16 (b) suits clearly appears in the legislative history of the amendments.[1] Indeed, this case is even more compelling than *Parden* on that score for the FELA contains no provision expressly including employees of public railroads under the Act but only a general provision making the FELA applicable to "every" common carrier by railroad in interstate commerce. 377 U. S., at 187–188. In contrast, Congress directly addressed the question whether fully to extend the FLSA, including the provision of § 16 (b), to the public employees of the defined public institutions: the 1966 amendments thus enact a considered congressional decision to extend the benefits of the FLSA enjoyed by employees of private employers to employees of the States, or political subdivisions thereof, employed in the institutions covered by the amendments. I find no support whatever in either the text of the amendments or their legislative history for the arguments made by the Court for its contrary conclusion.

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[1] That Congress made § 16 (b) as fully available to the public employees as to private employees is clear from explicit statements that the amendments were designed "to make plain the intent to bring under the coverage of the act employees of hospitals and related institutions, schools for physically or mentally handicapped or gifted children, or institutions of higher education, whether or not any of these hospitals, schools, or institutions are *public* or *private* or operated for profit or not for profit." S. Rep. No. 1487, 89th Cong., 2d Sess., 8 (1966) (emphasis added). And it is stated on the same page:

> "These enterprises which are *not proprietary*, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which 'constitute an unfair method of competition in commerce.'" (Emphasis added.)

Thus, I agree with the dissenting judges below that there is "in the circumstances surrounding this legislation a strong inference that Congress intended to afford state employees the same direct right of suit against their employers as is possessed by covered employees of nongovernmental employers." 452 F. 2d 820, 831 (1971) (Bright, J., dissenting).

First, the Court observes that § 16 (b) was left undisturbed when the amendments were adopted. But § 16 (b) in terms applies to "[*a*]*ny* employer" covered by the Act. The extension of coverage to employers of public institutions made by the amendments was only the latest of several extensions made since § 16 (b) first appeared in the FLSA as initially adopted. Obviously, the words "[*a*]*ny* employer" blanket all FLSA employers and it is only the sheerest sort of ritualism to suggest that Congress excluded the States from § 16 (b) suits by not expressly referring to the States in § 16 (b).

Second, the Court argues that Alabama's operation of the railroad in *Parden* was "proprietary" in nature and Missouri's operation of hospitals and schools is "governmental" in character. That distinction does not, however, support the conclusion that Congress failed with sufficient clarity to subject States to § 16 (b) suits. *Maryland* v. *Wirtz,* 392 U. S. 183 (1968), which sustained the constitutionality of the 1966 amendments, construed the reach of the amendments as covering public enterprises having both characteristics, and expressly held "that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." *Id.,* at 195. Indeed, the 1966 amendments themselves provide that the public enterprises, whether for profit or not for profit, "shall be deemed to be activities performed for a business purpose." 29 U. S. C. § 203 (r).[2]

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[2] The Court of Appeals for the Tenth Circuit rejected the governmental-proprietary distinction on facts identical to those of the

Third, the Court argues that the amendments may saddle the States with "enormous fiscal burdens," and that "Congress, acting responsibly, would not be presumed to take such action silently." *Ante,* at 284, 285. Not only is the ancestry of the supposed presumption not divulged, but the Court offers no explanation how it overbears the clearly declared congressional purpose to subject States to § 16 (b) suits. Moreover, this argument tracks the rejected argument of the dissent in *Maryland* v. *Wirtz* that the 1966 amendments "overwhelm state fiscal policy" and therefore offend "constitutional principles of federalism" in that they allow "the National Government [to] devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." 392 U. S., at 203–205.

Fourth, the Court argues that the authority of the Secretary of Labor under § 16 (c) to sue for unpaid minimum wages or unpaid overtime, and the Secretary's authority under § 17 to enjoin violations of the Act, "suggest that since private enforcement of the Act was not a paramount objective [of Congress], disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States." *Ante,* at 286. Again the Court ignores the evidence in the text and legislative history of the 1966 amendments that Congress not only was not "silent" but spoke loudly its purpose to deny the States the protection of sovereign immunity. In any event, the premise that "private enforcement of the Act was not a paramount objective" is wholly unfounded. For the Act's legislative

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present case. *Briggs* v. *Sagers,* 424 F. 2d 130, 132–133 (1970). See also *Sanitary District* v. *United States,* 266 U. S. 405, 426 (1925); *United States* v. *California,* 297 U. S. 175, 183–184 (1936); 3 K. Davis, Administrative Law Treatise 459–466 (1958); n. 1, *supra.*

history establishes conclusively that Congress placed great reliance upon the private lawsuit as an important tool for achieving the Act's objectives.[3] To buttress this, the Solicitor General has emphasized in his *amicus curiae* brief that without the private lawsuit, the purpose of the 1966 amendments cannot be achieved, since the Secretary of Labor has neither staff nor resources to take on the enormous number of claims counted upon to be vindicated in private actions. In addition, if state law may preclude actions in state courts,[4] the Solicitor General observes:

> "The unavoidable result is that state employees of schools and hospitals may find themselves in precisely the same situation as the employees in *Parden:* if they are unable to sue their state employer under Section 16 (b) they may be, for all practical purposes, left in the position of having a right without a remedy . . . ." Brief for United States as *Amicus Curiae* 23.[5]

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[3] See the comprehensive discussion in *Hodgson* v. *Wheaton Glass Co.*, 446 F. 2d 527 (CA3 1971). See also *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945); *Hodgson* v. *Ricky Fashions*, 434 F. 2d 1261 (CA5 1970).

[4] See the discussion, *infra*, at 308.

[5] The Solicitor General states that: "In 1971 . . . the Act covered 45.4 million employees and nearly 2 million establishments; 2.7 million of these employees and 118,000 of these establishments were in the sector of state and local government employment, including state schools and hospitals. Yet less than 4 percent of these establishments can be investigated by the Secretary each year." Brief for United States as *Amicus Curiae* 22–23.

On this account, it has been suggested that "the instant case is even more compelling than *Parden* in asserting that Congress' power to regulate commerce should override sovereign immunity. Since the Supreme Court was willing to find constructive waiver of immunity in order to give protection to a relatively small number of people—employees of state owned railways—even where Congress had not

The Court also argues:

> "In this connection, it is not amiss to note that § 16 (b) allows recovery by employees, not only of the amount of unpaid wages, but of an equal amount as liquidated damages and attorneys' fees. It is one thing, as in *Parden,* to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly. The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor." *Ante,* at 286.

Here, again, the Court relies upon the rejected argument of the dissent in *Maryland* v. *Wirtz* that the amendments unconstitutionally "overwhelm state fiscal policy." In any event, the purpose of double recovery has not the remotest connection with any design of Congress "in pursuit of a harmonious federalism." Actually its purpose is, in the Court's own words: "as in *Parden,* to make a state employee whole." That was made clear in

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made clear its desire that such protection be given, then a fortiori constructive waiver is applicable where Congress has specifically applied legislation to states as employers, where the class of persons meant to be protected is much greater, and where the purpose and need of regulation is a more fundamental and pressing expression of congressional regulation of commerce." 17 Vill. L. Rev. 713, 720–721 (1972).

Finally, the Secretary's enforcement powers are discretionary. Thus, "[a] suit by a state employee under § 216 (b) represents the only remedial provisions of the Act which assures [a state employee] of the opportunity of having his claim presented to a court." 452 F. 2d, at 833 (Bright, J., dissenting).

Brooklyn Savings Bank v. *O'Neil,* 324 U. S. 697, 707–708 (1945):

> "We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being. Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date. The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes."

The answer to the argument that we should be reluctant to believe that Congress "desired to treat the States so harshly" is that Congress extended the FLSA to the States to the extent of the 1966 amendments with full awareness that it was imposing a financial burden. As was cogently said by the Court of Appeals for the Tenth Circuit in *Briggs* v. *Sagers,* 424 F. 2d 130, 133–134 (1970):

> "The legislative history of the 1966 FLSA Amendments reflects that passage was to attain a 'minimum

> standard of living necessary for health, efficiency, and general well-being of workers . . . with all deliberate speed consistent with the policy of the act and the welfare of the American people.' [S. Rep. No. 1487, 89th Cong., 2d Sess., 3 (1966).] *This demonstrates to our satisfaction that Congress contemplated the financial burden that the Amendments could cause for the states. But the overall purpose of the FLSA tacitly suggests that the imposition of such strain is outweighed by the underlying policy of the Act.*" (Emphasis added.)

Finally, the Court suggests that to deny the employees a federal forum will not leave them without a right of action for damages since § 16 (b) authorizes suits in "any court of competent jurisdiction," and "[a]rguably, that permits suit in the Missouri courts." *Ante,* at 287. I am puzzled how the Court reconciles the implication that petitioners might maintain their § 16 (b) action in state court with its basic holding that only "clear" expression by Congress can be taken as "lifting the sovereignty of the States and putting the States on the same footing as other employers." *Ibid.* But, in any event, plaintiffs in *Parden* might also have sued in state courts since FELA jurisdiction is "concurrent with that of the courts of the several States," 45 U. S. C. § 56. Yet, we held that this was irrelevant to the issue of amenability of States to FELA suits in federal court since "Congress did not intend this language to limit the jurisdiction of the federal courts, but merely to provide an alternative forum in the state courts." 377 U. S., at 190 n. 8.

II

Congress can, of course, readily repair the deficiency the Court finds today in the FLSA simply by amending the Act expressly to declare that a State that engages in an enterprise covered by the 1966 amendments shall be amenable to suit under § 16 (b) in federal court. A greater reason for concern, therefore, is with the Court's and my Brother MARSHALL's treatment of the Eleventh Amendment and the doctrine of sovereign immunity as constitutional limitations upon the power of a federal court to entertain a suit brought against a State by one of its citizens. Since the Court's treatment differs from my Brother MARSHALL's in substantial respects, I shall discuss the two separately.

III

Parden regarded the Eleventh Amendment to be inapplicable to suits against a State brought by its own citizens in federal court and held that whether the FELA suit was maintainable turned on the availability to Alabama of the protection of the ancient doctrine of sovereign immunity. Yet the Court says, *ante,* at 284, that "[t]he history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State." Any intimation in that statement that we may infer from the Eleventh Amendment a "constitutional immunity," *ante,* at 285, protecting States from § 16 (b) suits brought in federal court by its own citizens, must be rejected. I emphatically question, as I develop later, that sovereign immunity is a constitutional limitation upon the federal judicial power to entertain suits against States. Indeed, despite some assumptions in opinions of this Court, I know of no concrete evidence that the framers of the Amendment thought, let alone intended, that even the Amendment would ensconce the doctrine of sovereign immunity. On its face, the Amendment says nothing about sovereign immunity but enacts an express limitation upon federal judicial power. It is familiar history that it was adopted as the response to the Court's decision in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), that construed Art. III, § 2, of the Constitution—that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . between a State and Citizens of another State"—to extend to a suit in federal court brought by individual citizens of South Carolina against the State of Georgia. An outraged outcry of financially embarrassed debtor States fearful of suits in federal court greeted that decision and resulted in the immediate proposal, and fairly prompt adoption, of the Eleventh Amendment. But all that the Amendment provides in terms is that "[t]he Judicial power of the United States shall *not* be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" (emphasis added). The literal wording is thus a flat prohibition against the federal judiciary's entertainment of suits against even a consenting State brought by citizens of another State or by aliens. In the very year the Amendment was formally ratified, 1798, this Court gave it that sweep in holding that "the amendment being constitutionally adopted, there could not be exercised any jurisdiction, *in any case,* past or future, in which a state was sued by the citizens of another state . . . ." *Hollingsworth* v. *Virginia,* 3 Dall. 378, 382 (1798) (emphasis added). It is true that cases since decided have said that federal courts do have power to entertain suits against consenting States. None has yet offered, however, a persuasively principled explanation for that conclusion in the face of the wording of the Amendment. Since the question whether the Eleventh Amendment constitutionalized sovereign immunity as to noncitizen suits should, therefore, be regarded as open, or at least ripe for further consideration, it is unfortunate that the

Court, by referring to the Amendment in this case after *Parden* held it to be inapplicable, should lend support to the argument that the Amendment reflects the existence of a constitutional bar to suits against a State brought by its own citizens.

In a nation whose ultimate sovereign is the people and not government, a doctrine premised upon kingship—or, as has been suggested, "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends," *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353 (1907)—is indefensible "if it represents, as the Court has more than once intimated, an unfortunate excrescence of a political and legal order which no longer enlists support . . . ." C. Jacobs, The Eleventh Amendment and Sovereign Immunity 160 (1972). Mr. Justice Frankfurter reminded us:

> "The course of decisions concerning sovereign immunity is a good illustration of the conflicting considerations that often struggle for mastery in the judicial process, at least implicitly. In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. Legal concepts are then found available to give effect to this feeling . . . ." *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 709 (1949) (dissenting opinion).

Ex parte Young, 209 U. S. 123 (1908), as well as its numerous progeny, holding that a federal court may enjoin state officers from enforcing an unconstitutional statute, was a notable example of a "[l]egal concept . . . found available to give effect to this feeling" that "governmental immunity runs counter to prevailing notions of reason and justice." *Parden* was another example. The Court's discussion today of the inapplicable Eleventh Amendment regrettably tends to exalt governmental immunity over "prevailing notions of reason and justice." It also casts a shadow upon the validity of the view expressed by Mr. Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264 (1821), that the Amendments did not apply to bar federal-question suits brought against a State by its own citizens. It had been argued in that case that:

> "The original clause [Art. III] giving jurisdiction on account of the character of the parties, as aliens, citizens of different States, etc. does not *limit,* but *extends* the judicial power of the Union. The [Eleventh] amendment applies to that alone. It leaves a suit between a State and a citizen, arising under the constitution, laws, etc. where it found it; and the States are still liable to be sued by a citizen, where the jurisdiction arises in this manner, and not merely out of the character of the parties." *Id.,* at 348-349 (emphasis added).

Mr. Chief Justice Marshall adopted this interpretation. In determining whether a writ of error was a "suit" within the meaning of the Eleventh Amendment, he said:

> "If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that *in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.*" *Id.,* at 412 (emphasis added).

In other words, the view of the great Chief Justice was that the Eleventh Amendment expressly withdrew the federal judicial power originally granted in federal-question cases only as to suits against States by citizens of other States or by aliens. I do not read *Hans* v. *Louisiana,* 134 U. S. 1 (1890), as has been suggested, Jacobs, *supra,* at 109, to reject Mr. Chief Justice Marshall's view that a State may be sued in federal court by its own citizens under the federal-question clause. *Hans* was also a suit against a State by its own citizens. The Court in *Hans* held that the Eleventh Amendment was inapplicable in such case (and *Parden* followed this holding), but that the State nevertheless enjoyed the protection of the ancient doctrine, inherent in the nature of sovereignty, that a State is not amenable to the suit of an individual without its consent. 134 U. S., at 10–15. Thus, even if the Eleventh Amendment is a constitutional restraint upon suits against States by citizens of another State, *Hans* accords to nonconsenting States only a nonconstitutional immunity from suit by its own citizens. True, Mr. Chief Justice Marshall's statement of the principle in *Cohens* v. *Virginia,* created a paradox: "a citizen with a claim under the Constitution or federal law against his own state might sue in the federal courts, while a citizen of another state or an alien, parties exercising much less, if any, influence upon the government of the state for its beneficence, would be denied a federal remedy." Jacobs, *supra,* at 91. *Hans* recognized that Mr. Chief Justice Marshall in *Cohens* v. *Virginia,* had said that, nevertheless, the federal-question clause of the Constitution should be read as making a State amenable to suit by one of its own citizens. 134 U. S., at 19–20. This Court gives particular weight to pronouncements of Mr. Chief Justice Marshall upon the meaning of his contemporaries in framing the Constitution. The *Hans* treatment of *Cohens* does not constitute an exception. The statement, *id.*, at 20 that the "observation was unnecessary to the decision . . . and . . . ought not to outweigh the important considerations referred to which lead to a different conclusion" implies at most a reservation. Whatever significance may be attached to the statement, however, the *Hans* opinion as an entirety can sensibly be read as resting the judgment squarely upon the ancient nonconstitutional doctrine of sovereign immunity. *Hans'* resolution of the parodox, in other words, was that, independently of any constitutional provision, such suits against a nonconsenting State by its own citizens are barred by sovereign immunity. It must, therefore, be reason for regret if the Court today, by its discussion of the Eleventh Amendment, suggests a constitutional limitation on the federal judicial power—a limitation that could have far-reaching and untoward consequences. As one commentator has observed:

> "If, as has been suggested, the American doctrine of sovereign immunity is indefensible upon both theoretical and pragmatic grounds—if it represents, as the Court has more than once intimated, an unfortunate excrescence of a political and legal order which no longer enlists support—its continued observance should depend upon whether it is incorporated into the Constitution and hence made obligatory upon the judiciary unless waived by the government. It is clear enough, of course, that if the doctrine is to have constitutional status, it must be judicially inferred. There is absolutely nothing in the original Constitution nor in any of the amendments expressly sanctioning the doctrine. And to this generalization the Eleventh Amendment,

> despite the outcry about sovereign immunity and the sovereignty of the states which preceded its adoption, does not constitute an exception. That amendment, to be sure, did impose a limitation upon the federal judicial power with respect to suits brought against the states by certain classes of individuals, but its language does not support the Court's far-reaching statement that 'as to the states, legal irresponsibility was written into the Eleventh Amendment.' [*Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 388 (1939).]" Jacobs, *supra,* at 160.

IV

My Brother MARSHALL takes a much different approach. He agrees, contrary to the Court, that *Parden* forecloses a State sued under § 16 (b) in federal court (and, he concludes, also in state court) from relying on the protection of the ancient doctrine of sovereign immunity, since the States surrendered their sovereignty to congressional control to that extent when Congress was given the Commerce power. Nevertheless, my Brother MARSHALL would affirm the judgment of the Court of Appeals on the basis of a construction that Art. III, even before the adoption of the Eleventh Amendment and independently of the ancient doctrine of sovereign immunity, implicitly barred federal courts from entertaining suits brought by individuals against nonconsenting States. The Eleventh Amendment, he argues, is simply a reaffirmation of that implicit constitutional limitation on the federal judicial power after this Court held otherwise in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793). Then, while admitting that the Eleventh Amendment is not literally applicable to suits brought against a State by its own citizens, he reads *Hans* v. *Louisiana, supra,* as applying the so-called jurisdictional bar of Art. III to such suits. Thus, he concludes that the present suit is beyond the judicial power of the federal courts, unless the State of Missouri is found to have consented. Moreover, his theory compels him to the paradoxical conclusion that Missouri can frustrate petitioners' vindication of their federally created rights in federal court, but is powerless to deny them vindication of those rights in its own courts.[6]

Jurisdiction of the suit before us is general federal-question jurisdiction under Art. III, § 2, cl. 1. That provision, of course, contains no exemption of States, and on its face obviously grants no form of immunity to the States. Rather, the more plausible reading of the plain words of the Article is that they extend federal judicial power to federal-question controversies between a State and individuals, whether citizens or noncitizens of the State. That certainly was the construction of the Article "as originally framed" expressed by Mr. Chief Justice Marshall in *Cohens* v. *Virginia, supra.* The Amendment overruled *Chisholm* v. *Georgia* to except suits by citizens of other States and by aliens, and thus was the ultimate resolution of the vehement protests of debtor States voiced during the ratification period. Those States feared that Art. III might expose them to suits in federal courts by out-of-state and alien creditors. *Chisholm* proved that the fears were justified. See Jacobs, *supra,* at 27–40; *Hans* v. *Louisiana, supra,* at 10–15. Madison and

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[6] My Brother MARSHALL disagrees with the Court on this issue. He takes the position that the state courts *must* entertain suits under the FLSA and, in such case, the State is foreclosed from relying on the protection of the ancient doctrine of sovereign immunity. The Court, on the other hand, although stating that it "is a question we need not reach," takes the position that state employees "arguably" may maintain a § 16 (b) suit in the state courts, *ante,* at 287, thus implying that the States are not necessarily compelled to entertain such suits.

Hamilton, along with John Marshall, had replied to these critics during the ratification period that suits against a State could only be maintained where the State has consented (as, for example, where the State is the plaintiff or an intervenor). This was not because of anything in Art. III, implicit or otherwise; rather, it was because "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.*" The Federalist No. 81 (Hamilton). *Hans* v. *Louisiana* conceded, *arguendo,* that there was federal-question jurisdiction to maintain the suit, but nevertheless concluded that the State was immune from suit. However, as was the case in the responses of Madison, Hamilton, and John Marshall to the critics of the ratification period, the Court, in my view, based its decision, not on some alleged jurisdictional prohibition drawn from Art. III, but rather on the principle that, independently of any constitutional provision, such suits are barred by sovereign immunity where the State has not voluntarily surrendered its immunity. Otherwise, there would have been no reason for the Court's lengthy quotation from Hamilton's definition of the ancient doctrine:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. *Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .*" 134 U. S., at 13, quoting from The Federalist No. 81 (Hamilton) (second emphasis added).

And the Court in *Hans* referred several times to the opinion of Mr. Justice Iredell in *Chisholm* v. *Georgia,* eventually concluding that Mr. Justice Iredell's views "were clearly right." *Id.*, at 14. Yet Mr. Justice Iredell did not suggest that Art. III contained an implicit, absolute jurisdictional bar against federal court suits brought by an individual against a State. On the contrary, his position, similar to that of Hamilton, was that unless a State consents, as it must be taken to have done where, for example, the suit involves an activity as to which the States surrendered their sovereignty in forming the Constitution, the States are protected by the ancient doctrine of sovereign immunity from being subjected to suit in federal court at the instance of individuals. Thus, Mr. Justice Iredell stated:

> "So far as States under the Constitution can be made legally liable to [federal judicial] authority, so far to be sure they are subordinate to the authority of the *United States*, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a State is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a State *can* be a party; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by a reference either to preexistent laws [common law], or laws passed under the Constitution and in conformity to it.
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> . . . . .
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> "If therefore, no new remedy be provided [by Congress under authority granted in the Constitution] . . . it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the Court could have been maintained against one of the States in

> the *Union* upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here . . . ." 2 Dall., at 436–437 (emphasis in original).

And in the end, *Hans* stated: "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion." 134 U. S., at 14–15. Thus, one cannot find support for interpreting Art. III as a jurisdictional bar in the "views of those great advocates and defenders of the Constitution."[7]

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[7] In *Hans* v. *Louisiana*, a citizen of Louisiana attacked his State's repudiation of its bond obligations in the state constitution as a violation of the Contract Clause prohibition against passage by States of laws impairing the obligation of contracts. The Court held that the action, although arising under the Constitution and laws of the United States within Art. III, was not maintainable against Louisiana without its consent. My Brother MARSHALL argues in n. 8 of his opinion concurring in the result that my view that *Hans* involved only a question of sovereign immunity is at odds with my view (shared by him at least as to the Commerce Clause) "that at the time the Union was formed the States surrendered that portion of their sovereignty which conflicted with the supreme federal powers." The obvious error is in my Brother MARSHALL's premise that "such a view [as to the commerce power] would seem to compel the conclusion that the States had also *pro tanto* surrendered their common-law immunity with respect to any claim under the Contract Clause." That conclusion is not compelled. My Brother MARSHALL's argument implies that *Hans*, if not read as holding that Art. III created a jurisdictional bar, may be read as holding that Art. III incorporated the ancient doctrine, and as also holding that the States, at least in the case of the Contract Clause, had not surrendered that immunity in forming the Union. I reject, of course, the premise that *Hans* may be read as a constitutional decision. But assuming a reading as holding that Art. III incorporated the ancient doctrine, there would be no inconsistency in holding that, while the States surrendered that immunity in respect to enumerated powers granted by the States to the National Government, such

In sum, except as the Eleventh Amendment may be read to create a jurisdictional bar against suits by citizens of another State or by aliens, the restriction on the exercise of the federal judicial power in suits against a State brought by individuals derives, not from anything in the Constitution, including Art. III, but from traditional nonconstitutional principles of sovereign immunity. Except, as Hamilton put it, where "there is a surrender of this immunity in the plan of the convention," in which case in my view consent is irrelevant, Art. III *extends* rather than *bars* exercise of federal judicial power to entertain such suits against consenting States, leaving open only the question whether the State in fact consented or may be deemed to have consented. *Hans* was a "sovereign immunity" case pure and simple; no alleged bar in either Art. III or the Eleventh Amendment played

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as the commerce power, there was no surrender in respect to self-imposed prohibitions, as in the case of the Contract Clause. In other words, my Brother MARSHALL's "supreme federal powers" are only the enumerated powers whose effective exercise required surrender of the protection of the ancient doctrine. The Commerce Clause is an enumerated power whose effective enforcement required surrender of immunity to empower Congress, when necessary, to subject the States to suit. The Contract Clause, on the other hand, is not an enumerated power and thus not among the "supreme federal powers." It is simply a prohibition self-imposed by the States upon themselves and it granted Congress no powers of enforcement by means of subjecting the States to suit or otherwise. In allowing Louisiana the ancient immunity, the Court in *Hans* took particular care to emphasize that the allowance in no other respect prevented effective enforcement of the prohibitions of the clause. The Court said: "Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment." 134 U. S., at 20-21.

any role whatever in that decision. Therefore, even if the Eleventh Amendment be read literally to prohibit the exercise of federal judicial power to entertain suits against a State brought by citizens of another State or foreign country (a question we need not decide in this case), my Brother MARSHALL has no support in *Hans* for bringing this suit by a State's own citizens within that prohibition. Stated simply, the holding of *Hans* is that the ancient principles of sovereign immunity limit exercise of the federal power to suits against consenting States. And the fundamental lesson of *Parden,* as my Brother MARSHALL concedes, is that by adopting and ratifying the Commerce Clause, the States surrendered a portion of their sovereignty as to those cases in which state activity touches on the federal regulatory power under the Commerce Clause. "[T]he States by the adoption of the Constitution, acting 'in their highest sovereign capacity, in the convention of the people,' waived their exemption from judicial power. . . . [J]urisdiction . . . was thus established 'by their own consent and delegated authority' as a necessary feature of the formation of a more perfect Union." *Principality of Monaco* v. *Mississippi,* 292 U. S. 313, 328–329 (1934).

Indeed, if Art. III is an absolute jurisdictional bar, my Brother MARSHALL is inconsistent in conceding that federal courts have power to entertain suits by or against consenting States. For I had always supposed that jurisdictional power to entertain a suit was not capable of waiver and could not be conferred by consent. It is true that, contrary to the different holding of *Hollingsworth* v. *Virginia,* 3 Dall. 378 (1798), some opinions have assumed that a State may consent to suit in federal court. Jacobs, *supra,* at 107–108. But the opinions making that assumption did not confront my Brother MARSHALL's theory that Art. III contains an implicit jurisdictional bar and, accordingly, do not address the highly provocative ancillary question whether such a bar would prohibit federal courts from entertaining suits even against consenting States. Doubtless because my Brother MARSHALL's theory did not occur to the judges, those cases (which did not arise under statutes like the FELA and FLSA) were treated as requiring decision, not in terms of my Brother MARSHALL's theory of a jurisdictional bar that may be removed only by actions tantamount to voluntary consent, but rather within the bounds of traditional notions of sovereign immunity—an immunity, I repeat, that my Brother MARSHALL agrees the States surrendered, as Hamilton said, "in the plan of the convention," at least insofar as Congress conditions a State's engagement in a regulated interstate enterprise upon amenability to suit. Yet, he argues that, while the surrendered immunity cannot arise to defeat a suit in *state* court under § 16 (b), it may be resurrected from the grave solely that it may be waived to lift the purported jurisdictional bar of Art. III to state employees' suits in *federal* court under § 16 (b). That reasoning, I say with all respect, simply defies logic. Indeed, even if *Hans* is a constitutional decision, and I do not think it is, at most it holds that Art. III is to be read to incorporate the ancient doctrine of sovereign immunity. But my Brother MARSHALL's reliance on *Hans* would fare no better in such case, for then the surrender of the immunity "in the plan of the convention" would obviously foreclose assertion of the immunity in suits in both state and federal courts brought under federal statutes founded on the commerce power.

V

"We the People" formed the governments of the several States. Under our constitutional system, therefore, a State is not the sovereign of its people. Rather, its people are sovereign. Our discomfort with sovereign immunity, born of systems of divine right that the Framers abhorred, is thus entirely natural. The discomfort has markedly increased since subsidence of the controversy over judicial review of state decisions that was fought out in terms of the amenability of States to suit in federal court. Jacobs, *supra,* at 41–74. *Ex parte Young,* 209 U. S. 123 (1908), substantially eviscerated governmental immunity in holding that individuals might sue in federal court to enjoin state officers from enforcing unconstitutional statutes. Congress, reflecting agreement with the soundness of the view that "the doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law," C. Wright, Handbook of the Law of Federal Courts 186 (2d ed. 1970), accepted that decision. *Perez* v. *Ledesma,* 401 U. S. 82, 104–110 (opinion of BRENNAN, J.). In short, the trend since *Hans* was decided in 1890 has been against enforcement of governmental immunity except when clearly required by explicit textual prohibitions, as in the Eleventh Amendment. Moreover, as *Parden* illustrates, the trend also is to interpret those prohibitions narrowly and literally. For none can gainsay that a State may grievously hurt one of its citizens. Our expanding concepts of public morality are thus offended when a State may escape legal redress for its wrongs. I need not address in this case, however, the question whether today's decision constitutes a denial of the Fifth Amendment's counterpart guarantee of due process. See, however, Jacobs, *supra,* at 163–164. Our constitutional commitment, recited in the Preamble, is to "establish Justice." That keystone objective is furthered by the trend toward limitation of the defense of governmental immunity represented by *Ex parte Young* and *Parden.* Today, however, the Court and my Brother MARSHALL arrest the trend—the Court by watering down *Parden* in reliance on the *Parden* dissent and in its discussion of the inapplicable Eleventh Amendment, and my Brother MARSHALL by rejecting Mr. Chief Justice Marshall's view that no jurisdictional bar may be implied in Art. III.

I would reverse the Court of Appeals and remand the case to the District Court with direction to proceed to trial on the complaint.

ASKEW, GOVERNOR OF FLORIDA, ET AL. *v.* AMERICAN WATERWAYS OPERATORS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

No. 71-1082. Argued November 14, 1972—Decided April 18, 1973

Florida Oil Spill Prevention and Pollution Control Act, providing for the State's recovery of cleanup costs and imposing strict, no-fault liability on waterfront oil-handling facilities and ships destined for or leaving such facilities for any oil-spill damage to the State or private persons, does not, in the context of this action by shipping interests to enjoin application of the Florida statute, invade a regulatory area pre-empted by the federal Water Quality Improvement Act, which is concerned solely with recovery of actual cleanup costs incurred by the Federal Government, and presupposes a coordinated federal-state effort to deal with coastal oil pollution. Nor is the State's police power over sea-to-shore pollution pre-empted by the Admiralty Extension Act, which does not purport to supply an exclusive remedy in this admiralty-related situation. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, distinguished. Pp. 329-344.

335 F. Supp. 1241, reversed.

DOUGLAS, J., delivered the opinion for a unanimous Court.

Robert L. Shevin, Attorney General of Florida, and *Daniel S. Dearing* argued the cause and filed briefs for appellants.

LeRoy Collins and *Nicholas J. Healy* argued the cause for appellees. With *Mr. Collins* on the brief for appellees American Waterways Operators, Inc., et al. were *Joseph C. Jacobs, John B. Chandler, Jr.,* and *Stewart D. Allen.* With *Mr. Healy* on the brief for appellees American Institute of Merchant Shipping et al. were *Gordon W.*

Paulsen, Dewey R. Villareal, Jr., and *Emil A. Kratovil, Jr.* *James F. Moseley* filed a brief for appellees Suwannee Steamship Co. et al.*

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*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger,* Attorney General, *Jay L. Shavelson,* Assistant Attorney General, and *Carl Boronkay* and *Jeffrey C. Freedman,* Deputy Attorneys General, for the State of California; by *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, and *Alfred L. Evans, Jr., James B. Talley,* and *Courtney Wilder Stanton,* Assistant Attorneys General, for the State of Georgia; by *George Pai,* Attorney General, and *Nobuki Kamida* and *Alan M. Goda,* Deputy Attorneys General, for the State of Hawaii; by *Francis B. Burch,* Attorney General, *Henry R. Lord,* Deputy Attorney General, and *Warren K. Rich,* Assistant Attorney General, for the State of Maryland; by *Robert H. Quinn,* Attorney General, and *Walter H. Mayo III* and *Roger Tippy,* Assistant Attorneys General, for the Commonwealth of Massachusetts; by *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Hugh B. Anderson* and *Charles S. Alpert,* Assistant Attorneys General, for the State of Michigan; by *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Philip Weinberg* and *James P. Corcoran,* Assistant Attorneys General, for the State of New York, joined by *Robert K. Killian,* Attorney General of Connecticut, and *W. Laird Stabler, Jr.*, Attorney General of Delaware; by *Robert Morgan,* Attorney General, and *Christine Y. Denson,* Assistant Attorney General, for the State of North Carolina; by *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *Houghton Brownlee, Jr.*, and *John Milton Richardson,* Assistant Attorneys General, for the State of Texas; by *Andrew P. Miller,* Attorney General, and *C. Tabor Cronk,* Assistant Attorney General, for the Commonwealth of Virginia; and by *Slade Gorton,* Attorney General, *Charles B. Roe, Jr.*, Senior Assistant Attorney General, and *Charles W. Lean,* Assistant Attorney General, for the State of Washington.

Briefs of *amici curiae* urging affirmance were filed by *Robert G. McCreary, James J. Higgins, Warren A. Jackman, Sam L. Levinson, David R. Owen, John C. Shepherd,* and *Benjamin W. Yancey* for

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This action was brought by merchant shipowners and operators, world shipping associations, members of the Florida coastal barge and towing industry, and owners and operators of oil terminal facilities and heavy industries located in Florida, to enjoin application of the Florida Oil Spill Prevention and Pollution Control Act, Fla. Laws 1970, c. 70-244, Fla. Stat. Ann. § 376.011 *et seq.* (Supp. 1973) (hereinafter referred to as the Florida Act). Officials responsible for enforcing the Florida Act were named as defendants, but the State of Florida intervened as a party defendant, asserting that its interests were much broader than those of the named defendants. A three-judge court was convened pursuant to 28 U. S. C. § 2281.

The Florida Act imposes strict liability for any damage incurred by the State or private persons as a result of an oil spill in the State's territorial waters from any waterfront facility used for drilling for oil or handling the transfer or storage of oil (terminal facility) and from any ship destined for or leaving such facility. Each owner or operator of a terminal facility or ship subject to the Act must establish evidence of financial responsibility by insurance or a surety bond.[1] In addition, the Florida Act provides for regulation by the State Department of Natural Resources with respect to con-

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the American Bar Association, and by *John M. McHose* for the Maritime Law Association of the United States.

Solicitor General Griswold and *Assistant Attorneys General Frizzell* and *Wood* filed a brief for the United States as *amicus curiae.*

[1] At the hearing on plaintiffs-appellees' application for a temporary restraining order, it was indicated that none of the plaintiffs had attempted to comply with the Florida Act. Shipowners and operators had threatened to divert their vessels from Florida ports.

tainment gear and other equipment which must be maintained by ships and terminal facilities for the prevention of oil spills.

Several months prior to the enactment of the Florida Act, Congress enacted the Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U. S. C. § 1161 *et seq.* (hereinafter referred to as the Federal Act).[1a] This Act subjects shipowners and terminal facilities to liability without fault up to $14,000,000 and $8,000,000, respectively, for cleanup costs incurred by the Federal Government as a result of oil spills. It also authorizes the President to promulgate regulations requiring ships and terminal facilities to maintain equipment for the prevention of oil spills. It is around that Act and the federally protected tenets of maritime law evidenced by *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and its progeny that the controversy turns. The District Court held that the Florida Act is an unconstitutional intrusion into the federal maritime domain. It declared the Florida Act null and void and enjoined its enforcement. 335 F. Supp. 1241.

The case is here on direct appeal. We reverse. We find no constitutional or statutory impediment to permitting Florida, in the present setting of this case, to establish any "requirement or liability" concerning the impact of oil spillages on Florida's interests or concerns. To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.

[1a] The Water Quality Improvement Act of 1970 was amended after this case was docketed by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U. S. C. §§ 1251-1376. Since the sections of the 1970 Act cited in the opinion have not been substantially changed, references to the 1970 Act have been retained.

I

It is clear at the outset that the Federal Act does not preclude, but in fact allows, state regulation. Section 1161 (*o*) provides that:

> "(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency *under any provision of law for damages to any publicly-owned or privately-owned property* resulting from a discharge of any oil or from the removal of any such oil.
>
> "(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil into any waters within such State.
>
> "(3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section." (Emphasis added.)

According to the Conference Report, "any State would be free to provide requirements and penalties similar to those imposed by this section or *additional requirements and penalties.* These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts."[2] (Emphasis added.) The Florida Act covers a wide range of "pollutants," § 3 (7), and a restricted definition of pollution. § 3 (8). We have here, however, no question concerning any pollutant except oil.

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[2] H. R. Conf. Rep. No. 91-940, p. 42.

The Federal Act, to be sure, contains a pervasive system of federal control over discharges of oil "into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." § 1161 (b)(1). So far as liability is concerned, an owner or operator of a vessel is liable to the United States for actual costs incurred for the removal of oil discharged in violation of § 1161 (b)(2) in an amount "not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser," § 1161 (f)(1), except for discharges caused solely by an act of God, act of war, negligence of the United States, or act or omission of another party. With like exceptions the owner or operator of an onshore or offshore facility is liable to the United States for the actual costs incurred by the United States in an amount not to exceed $8,000,000. § 1161 (f)(2)–(3). But in each case the owner or operator is liable to the United States for the full amount of the costs where the United States can show that the discharge of oil was "the result of willful negligence or willful misconduct within the privity and knowledge of the owner." Comparable provisions of liability spell out the obligations of "a third party" to the United States for its actual costs incurred in the removal of the oil. § 1161 (g).

So far as vessels are concerned the federal Limited Liability Act, 46 U. S. C. §§ 181–189, extends to damages caused by oil spills even where the injury is to the shore. *Richardson* v. *Harmon*, 222 U. S. 96, 106. That Act limits the liabilities of the owners of vessels to the "value of such vessels and freight pending." 46 U. S. C. § 189.

Section 12 of the Florida Act makes all licensees[3] of terminal facilities "liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others," it not being necessary for the State to plead or prove negligence.[4] There is no conflict between § 12 of the Florida Act and § 1161 of the Federal Act when it comes to damages to property interests, for the Federal Act reaches only costs of cleaning up. As respects damages, § 14 of the Florida Act requires evidence of financial responsibility of a terminal facility or vessel—a provision which does not conflict with the Federal Act.

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[3] Those required to obtain a license are those who operate a terminal facility. § 6 (1). But licenses to terminal facilities include

The Solicitor General says that while the Limited Liability Act, *so far as vessels are concerned,* would override § 12 of the Florida Act by reason of the Supremacy Clause, the Limited Liability Act has no bearing on "facilities" regulated by the Florida Act. Moreover, § 12 has not yet been construed by the Florida courts and it is susceptible of an interpretation *so far as vessels are concerned* which would be in harmony with the Federal Act. Section 12 does not *in terms* provide for unlimited liability.

Moreover, while the Federal Act determines damages measured by the cost to the United States for cleaning up oil spills, the damages specified in the Florida Act relate in part to the cost to the State of Florida in cleaning up the spillage. Those two sections are harmonious parts of an integrated whole. Section 1161 (c) (2) directs the President to prepare a National Con-

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"vessels used to transport oil, petroleum products, their by-products, and other pollutants between the facility and vessels within state waters." § 6 (4).

[4] Section 12 also provides that the pilot or the master of any vessel or person in charge of any licensee's terminal facility who fails "to give immediate notification of a discharge to the port manager and the nearest coast guard station" may be imprisoned for not more than two years or fined not more than $10,000.

tingency Plan for the containment, dispersal, and removal of oil. The plan must provide that federal agencies "shall" act "in coordination with State and local agencies." Cooperative action with the States is also contemplated by § 1161 (e), which provides that "[i]n addition to any other action taken by a State or local government" the President may, when there is an imminent and substantial threat to the public health or welfare, direct the United States Attorney of the district in question to bring suit to abate the threat. The reason for the provision in § 1161 (*o*)(2), stating that nothing in § 1161 pre-empts any State "from imposing any requirement or liability with respect to the discharge of oil into any waters within such State," is that the scheme of the Act is one which allows—though it does not require—cooperation of the federal regime with a state regime.

If Florida wants to take the lead in cleaning up oil spillage in her waters, she can use § 12 of the Florida Act and recoup her costs from those who did the damage. Whether the amount of costs she could recover from a wrongdoer is limited to those specified in the Federal Act and whether in turn this new Federal Act removes the pre-existing limitations of liability in the Limited Liability Act are questions we need not reach here. Any opinion on them is premature. It is sufficient for this day to hold that there is room for state action in cleaning up the waters of a State and recouping, at least within federal limits, so far as vessels are concerned, her costs.

Beyond that is the potential claim under § 12 of the Florida Act for "other damage incurred by the state and for damages resulting from injury to others." The Federal Act in no way touches those areas. A State may have public beaches ruined by oil spills. Shrimp may be destroyed, and clam, oyster, and scallop beds ruined and the livelihood of fishermen imperiled.[5] The Federal

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[5] As to the damages of oil spills to ecological factors it was recently said in 10 Harv. Int'l L. J. 316, 321–323 (1969):

"Some damage to marine life is obvious in the wake of a disaster such as the one which befell the 'Torrey Canyon.' Surface feeding fishes die when they swim into floating oil, and even slight, non-fatal contact may render their flesh inedible. Shellfish, among others, are also vulnerable to oil pollution. When the tanker 'P. W. Thirtle' grounded off Newport, Rhode Island, 31,000 gallons of heavy black oil were discharged from her tanks in an effort to refloat the ship; the result of this was the virtual destruction of the entire oyster fishery of Narragansett Bay. The most serious consequences of oil pollution, however, may not be those which are immediately obvious.

"According to Dr. Erwin S. Iversen, a marine biologist:

" 'The greatest problem may be the toxic effects on the intertidal animals that serve as food for the other more important fishes. . . . I don't think the effect is merely that of killing large populations of commercial fishes. Worse than that, it interrupts the so-called food chain.'

"There have been few specific studies of the effect that oil accumulation has on this food chain. One study, conducted by Dr. Paul Galtsoff of the United States Fish and Wildlife Service, found that the diatoms on which oysters feed will not grow where there is even a slight trace of oil on the water. The effect of oil on such microscopic marine plant life may be of great importance, because it is estimated that it takes as much as ten pounds of plant matter to produce one pound of fish.

"Large scale oil pollution, such as that which occurred when the 'Torrey Canyon' ran into the Seven Stones Reef, results in huge losses of water birds. Aside from humane and aesthetic considerations, these birds play a vital role in the ecology of the seashore, a role which profoundly affects the fishing industry. The uncertainty as to the actual extent of the damage done to marine life by oil pollution makes it difficult to estimate the economic effect of such damage, but the importance of the fishing industry within the world's economy is not in doubt and is steadily increasing. Between 1958 and 1963, for example, there was a 42% rise in the world catch. Be-

Act takes no cognizance of those claims but only of costs to the Federal Government, if it does the cleaning up.

We held in *Skiriotes* v. *Florida,* 313 U. S. 69, that while Congress had regulated the size of commercial sponges taken in Florida waters, it had not dealt with any diving apparatus that might be used. Florida had such a law and was allowed to enforce it against one of its citizens. Mr. Chief Justice Hughes, speaking for the Court, said: "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State." *Id.,* at 75.

Similarly, in *Manchester* v. *Massachusetts,* 139 U. S. 240, 266, we stated that if Congress fails to assume control of fisheries in a bay, "the right to control such fisheries must remain with the State which contains such bays."

Florida in her brief accurately states that no remedy under the Federal Act exists for state or private property owners damaged by a massive oil slick such as hit England and France in 1967 in the *Torrey Canyon* disaster. The *Torrey Canyon* carried 880,000 barrels

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cause of the increasing importance of seafood protein, future damage to marine life will have progressively greater economic consequences.

"Perhaps the most noticeable damage caused by oil pollution is the fouling of recreational beaches and shorefront property. One-half million tons of oil are washed ashore each year, rendering beaches unfit for swimming and filling the air with unpleasant odors. Besides the annoyance that this causes a vacationing public seeking relief from urban life, economic loss may be considerable. It is estimated, for example, that a serious oil spill off Long Island during the summer months would cost resort and beach operators thirty million dollars. Oil spills also create navigational and fire hazards in harbors, ports and marinas." (Footnotes omitted.)

of crude oil.[6] Today not only is more oil being moved by sea each year but the tankers are much larger.

"The average tanker used during World War II had a capacity of 16,000 tons, but by 1965 that average had risen to 27,000 tons, and new tankers delivered in 1966 averaged about 76,000 tons. A Japanese company has launched a 276,000-ton tanker, and other Japanese yards have orders for tankers as large as 312,000 tons. More than sixty tankers of 150,000 tons or more are on order throughout the world, tankers of 500,000 to 800,000 tons are on the drawing boards, and those of more than one million tons are thought to be feasible. On the new 1,010 foot British tanker 'Esso Mercia' two officers have been issued bicycles to help patrol the decks of the 166,890 ton vessel.

"The size of the tanker fleet itself is growing at a rate that rivals the growth in average size of new tankers. In 1955 the world tanker fleet numbered about 2,500 vessels. By 1965 it had increased to 3,500, and in 1968 it numbered some 4,300 ships. At the present time nearly one ship out of every five in the world merchant fleet is engaged in transporting oil, and nearly the entire fleet is powered by oil." [7]

Our Coast Guard reports[8] that while in 1970 there were 3,711 oil spills in our waters, in 1971 there were 8,736. The damage to state interests already caused by oil spills, the increase in the number of oil spills, and the risk of ever-increasing damage by reason of the size of modern tankers underlie the concern of coastal States.

While the Federal Act is concerned only with actual cleanup costs incurred by the Federal Government, the

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[6] Brief for Appellants 25.

[7] 10 Harv. Int'l L. J., at 317-318 (footnotes omitted).

[8] Polluting Incidents In and Around U. S. Waters, Calendar Year 1971, Environmental Protection, Commandant U. S. Coast Guard.

State of Florida is concerned with its own cleanup costs. Hence there need be no collision between the Federal Act and the Florida Act because, as noted, the Federal Act presupposes a coordinated effort with the States, and any federal limitation of liability runs to "vessels," not to shore "facilities." That is one of the reasons why the Congress decided that the Federal Act does not pre-empt the States from establishing either *"any requirement or liability"* respecting oil spills.

Moreover, since Congress dealt only with "cleanup" costs, it left the States free to impose "liability" in damages for losses suffered both by the States and by private interests. The Florida Act imposes liability without fault. So far as liability without fault for damages to state and private interests is concerned, the police power has been held adequate for that purpose. State statutes imposing absolute liability on railroads for *all* property lost through fires caused by sparks emitted from locomotive engines have been sustained. *St. Louis & San Francisco R. Co.* v. *Mathews,* 165 U. S. 1. The Federal Act, however, while restricted to cleanup costs incurred by the United States, imposes limited liability for those costs and provides certain exceptions, unless willfulness is established. Where liability is imposed by §§ 1161 (f)–(g), previously summarized, the United States may recover the full amount of the costs where the oil spillage was the result of "willful negligence or willful misconduct." If the coordinated federal plan in actual operation leaves the State of Florida to do the cleanup work, there might be financial burdens imposed greater than would have been imposed had the Federal Government done the cleanup work. But it will be time to resolve any such conflict between federal and state regimes when it arises.

Nor can we say at this point that regulations of the Florida Department of Natural Resources requiring "containment gear" pursuant to § 7 (2)(a) of the Florida Act would be *per se* invalid because the subject to be regulated requires uniform federal regulation. Cf. *Huron Cement Co.* v. *Detroit,* 362 U. S. 440. Resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations promulgated on December 21, 1972, pursuant to § 1161 (j)(1) of the Federal Act, 37 Fed. Reg. 28250, should await a concrete dispute under applicable Florida regulations. Finally, the provision of the Florida Act requiring the licensing of terminal facilities, a traditional state concern, creates no conflict *per se* with federal legislation. Section 1171 (b)(1) of the Federal Act provides that federal permits will not be issued to terminal facility operators or owners unless the applicant first supplies a certificate from the State that his operation "will be conducted in a manner which will not violate applicable water quality standards." And Tit. I, § 102 (b), of the recently enacted Ports and Waterways Safety Act of 1972, Pub. L. 92–340, 86 Stat. 426, 33 U. S. C. § 1222 (b) (1970 ed., Supp. II), provides that the Act does not prevent "a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title."

II

And so, in the absence of federal pre-emption and any fatal conflict between the statutory schemes, the issue comes down to whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government.

The main barriers found by the District Court to the Florida Act are *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and its progeny. *Jensen* held that a maritime worker on a vessel in navigable waters could not constitutionally receive an award under New York's workmen's compensation law, because the remedy in admiralty was exclusive. Later, in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, after Congress expressly allowed the States in such cases to grant a remedy, the Court held that Congress had no such power.

But those decisions have been limited by subsequent holdings of this Court. As stated by Mr. Justice Frankfurter in *Romero* v. *International Terminal Co.,* 358 U. S. 354, 373, *Jensen* and its progeny mark isolated instances where "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." Mr. Justice Frankfurter added, however: "But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity." *Id.,* at 373–374.

Moreover, in *Just* v. *Chambers,* 312 U. S. 383, we gave our approval to *The City of Norwalk,* 55 F. 98, written by Judge Addison Brown, holding that a State may modify or supplement maritime law even by creating a liability which a court of admiralty would recognize and enforce, provided the state action is not hostile "to the characteristic features of the maritime law or inconsistent with federal legislation," 312 U. S., at 388. Mr. Chief Justice Hughes after citing *Steamboat Co.* v. *Chase,* 16

Wall. 522, and *Sherlock* v. *Alling,* 93 U. S. 99, went on to hold that, while no suit for wrongful death would lie in the federal courts under general maritime law, state statutes giving damages in such cases were valid. He said, "The grounds of objection to the admiralty jurisdiction in enforcing liability for wrongful death were similar to those urged here; that is, that the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, requires harmony in its administration and cannot be subject to defeat or impairment by the diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law. But these contentions proved unavailing and the principle was maintained that a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' It was decided that the state legislation encountered none of these objections. The many instances in which state action had created new rights, recognized and enforced in admiralty, were set forth in *The City of Norwalk,* and reference was also made to the numerous local regulations under state authority concerning the navigation of rivers and harbors. There was the further pertinent observation that the maritime law was not a complete and perfect system and that in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration. These views find abundant support in the history of the maritime law and in the decisions of this Court." 312 U. S., at 389–390.

Mr. Chief Justice Hughes added that our decisions as of 1941, the date of *Just* v. *Chambers,* gave broad "recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Id.,* at 391.

Historically, damages to the shore or to shore facilities were not cognizable in admiralty. See, *e. g., The Plymouth,* 3 Wall. 20; *Martin* v. *West,* 222 U. S. 191. Mr. Justice Story wrote in 1813, "In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide."[9] *Thomas* v. *Lane,* 23 F. Cas. 957, 960 (No. 13,902) (CC Me.).

On June 19, 1948, Congress enacted the Admiralty Extension Act, 46 U. S. C. § 740.[10] The Court considered the Act in *Victory Carriers, Inc.* v. *Law,* 404 U. S. 202. In that case, the Court held that the Admiralty Extension Act did not apply to a longshoreman performing loading and unloading services on the dock. The longshoreman was relegated to his remedy under the state workmen's compensation law. *Id.,* at 215. The Court said, "At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law." *Id.*, at 214.[11]

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[9] A statement we recently quoted with approval in *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U. S. 249, 253, and *Victory Carriers, Inc.* v. *Law,* 404 U. S. 202, 205.

[10] It provides in relevant part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

The Admiralty Extension Act has survived constitutional attack in the lower federal courts[12] and was applied without question by this Court in *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206. The Court recognized in *Victory Carriers*, however, that the Act may "intrude on an area that has heretofore been reserved for state law." *Id.*, at 212. It cautioned that under these circumstances, "we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts." *Ibid.* While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. One can read the history of the Admiralty Extension Act without finding any clear indication that Congress intended that sea-to-shore injuries be exclusively triable in the federal courts.[13]

Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law. Thus in *Kelly* v. *Washington*, 302 U. S. 1, it appeared that, while Congress had provided a comprehensive system of inspection of vessels on navigable waters, *id.*, at 4, the State of Washington also had a comprehensive code of inspection. Some of those state standards conflicted with the federal requirements, *id.*, at 14–15; but those provisions of the Washington law relating to safety and seaworthiness were not in conflict with the federal law. So the question was whether the absence of congressional action and the need for uniformity of regulation barred state action. Mr. Chief Justice Hughes, writing for the Court, ruled in the negative, saying:

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[11] The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, recently was amended to cover employees working on shoreside areas customarily used by an employer in loading, unloading, repairing, or building a vessel. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92–576, § 2, 86 Stat. 1251.

[12] See *Victory Carriers, supra,* at 209 n. 9.

[13] See H. R. Rep. No. 1523, 80th Cong., 2d Sess.; S. Rep. No. 1593, 80th Cong., 2d Sess.

> "A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises." *Id.*, at 15.

That decision was rendered before the Admiralty Extension Act was passed.

Huron Cement Co. v. *Detroit,* 362 U. S. 440, however, arose after that Act became effective. Ships cruising navigable waters and inspected and licensed under federal acts were charged with violating Detroit's Smoke Abatement Code. The company and its agents were, indeed, criminally charged with violating that Code. The Court in sustaining the state prosecution said:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Id.*, at 442.

The Court reasoned that there was room for local control since federal inspection was "limited to affording protection from the perils of maritime navigation," while the Detroit ordinance was aimed at "the elimination of air pollution to protect the health and enhance the cleanliness of the local community." *Id.*, at 445. The Court, in reviewing prior decisions, noted that a federally licensed vessel was not exempt (1) "from local pilotage laws"; (2) "local quarantine laws"; (3) "local safety inspections"; or (4) "local regulation of wharves and docks." *Id.*, at 447.

It follows, *a fortiori*, that sea-to-shore pollution—historically within the reach of the police power of the States—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy.

As discussed above, we cannot say with certainty at this stage that the Florida Act conflicts with any federal Act. We have only the question whether the waiver of pre-emption by Congress in § 1161 (*o*)(2) concerning the imposition by a State of "any requirement or liability" is valid.

It is valid unless the rule of *Jensen* and *Knickerbocker Ice* is to engulf everything that Congress chose to call "admiralty," pre-empting state action. *Jensen* and *Knickerbocker Ice* have been confined to their facts, *viz.*, to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews. The fact that a whole system of liabilities was established on the basis of those two cases, led us years ago to establish the "twilight zone" where state regulation was permissible. See *Davis* v. *Department of Labor,* 317 U. S. 249, 252–253. Where there was a hearing by a federal agency and a conclusion by that agency that the case fell within the federal jurisdiction, we made its findings final. *Ibid.* Where there were no such findings, we presumed state law, in terms applicable, was constitutional. *Id.*, at 257–258. That is the way the "twilight zone" has been defined.

Jensen thus has vitality left. But we decline to move the *Jensen* line of cases shoreward to oust state law from situations involving shoreside injuries by ships on navigable waters. The Admiralty Extension Act does not pre-empt state law in those situations. See *Nacirema Operating Co.* v. *Johnson,* 396 U. S. 212.

The judgment below is

Reversed.

HENSLEY v. MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1428. Argued January 15, 1973—Decided April 18, 1973

Restraints imposed on petitioner who was released on his own recognizance constitute "custody" within the meaning of the federal habeas corpus statute, 28 U. S. C. §§ 2241 (c)(3), 2254 (a). Pp. 348-353.

453 F. 2d 1252, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 353. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 354.

Stanley A. Bass argued the cause for petitioner. With him on the brief were *Jack Greenberg* and *Peter R. Stromer*.

Dennis Alan Lempert argued the cause for respondent. With him on the brief was *Louis P. Bergna*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to determine whether a person released on his own recognizance is "in custody" within the meaning of the federal habeas corpus statute, 28 U. S. C. §§ 2241 (c)(3), 2254 (a). See *Peyton* v. *Rowe*, 391 U. S. 54 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Jones* v. *Cunningham*, 371 U. S. 236 (1963). Petitioner initiated this action in the United States District Court for the Northern District of California, challenging a state court conviction on First and Fourteenth

Amendment grounds. The court denied relief, holding that since the petitioner was enlarged on his own recognizance pending execution of sentence, he was not yet "in custody" for purposes of the habeas corpus statute. The Court of Appeals for the Ninth Circuit agreed that release on one's own recognizance is not sufficient custody to confer jurisdiction on the District Court, and affirmed the judgment. 453 F. 2d 1252 (1972).[1] We granted certiorari, 409 U. S. 840 (1972), and we reverse.

Convicted of a misdemeanor in California Municipal Court for violation of § 29007 of the California Education Code,[2] petitioner was sentenced to serve one year in jail and pay a fine of $625. He appealed his conviction unsuccessfully to the Appellate Department of the Superior Court, and his efforts to have the conviction set aside on state court collateral attack have proved equally unavailing. It appears that petitioner exhausted all available state court remedies prior to filing this petition for federal habeas corpus. See 28 U. S. C. § 2254 (b).[3]

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[1] The Court of Appeals concluded that the question was controlled by a prior decision of the same court, *Matysek* v. *United States*, 339 F. 2d 389 (1964).

[2] Petitioner was convicted of awarding Doctor of Divinity degrees without obtaining the necessary accreditation. He defended the charge on the grounds that he is the chief presiding officer of a bona fide church, that his church has awarded honorary Doctor of Divinity certificates to persons who have completed a course of instruction in the church's principles, and that state interference with this practice is an unconstitutional restraint on the free exercise of his religious beliefs.

[3] There is a substantial question whether petitioner has forfeited the right to raise his First and Fourteenth Amendment challenge to the state court conviction by deliberately bypassing an opportunity to raise the claim in the state courts. See *Fay* v. *Noia,* 372 U. S. 391 (1963). Respondent maintains that petitioner deliberately absented himself from trial following the close of the prosecution's case, with

At all times since his conviction petitioner has been enlarged on his own recognizance. While pursuing his state court remedies he remained at large under an order of the state trial court staying execution of his sentence. And the state trial court extended its stay, even after the Supreme Court of California declined to hear his application for postconviction relief, apparently to permit petitioner to remain at large while seeking habeas corpus in the United States District Court. Pending appeal from the District Court's denial of relief, an application for extension of the state court stay was granted by Mr. Justice Black, as Acting Circuit Justice, on August 12, 1970, and extended by MR. JUSTICE DOUGLAS, as Circuit Justice, on August 20, 1970, and again on September 9, 1970.[4] The Court of Appeals affirmed the denial of habeas corpus, but granted a 30-day stay of its mandate pending application for certiorari. That stay was extended by MR. JUSTICE DOUGLAS, as Circuit Justice, on March 20, 1972, and it is pursuant to his order that petitioner remains at large at the present time.

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full knowledge that the trial would continue in his absence. He thereby relinquished, respondent contends, the right to defend himself and present evidence on his behalf. Petitioner argues in response that trial counsel failed to advise him of the reopening of trial and failed to warn him that absence from trial would lead to conviction. Accordingly, he asserts that he should not be held to have knowingly and intelligently bypassed an available state procedure. The record on this point is more than a little obscure, and we express no opinion on the question beyond noting that the issue was not considered, much less resolved, by either of the courts below, and it is not in any sense presented for our decision.

[4] In his Motion for Stay, filed in this Court on August 11, 1970, and addressed to the Circuit Justice of the Ninth Circuit, petitioner explained that the "Stay of Execution granted by the Trial Court is scheduled to expire on August 12, 1970, at which time petitioner has been ordered to surrender himself to the Sheriff of Santa Clara County for immediate incarceration." Motion for Stay 2.

The California Penal Code provides that any court that may release a defendant upon his giving bail may release him on his own recognizance, provided he agrees in writing that:

> "(a) He will appear at all times and places as ordered by the court or magistrate releasing him and as ordered by any court in which, or any magistrate before whom, the charge is subsequently pending.
>
> "(b) If he fails to so appear and is apprehended outside of the State of California, he waives extradition.
>
> "(c) Any court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance . . . ." Cal. Penal Code § 1318.4.

A defendant is subject to re-arrest if he fails to appear as agreed, *id.*, § 1318.8 (a), and a willful failure to appear is itself a criminal offense. *Id.*, § 1319.6. We assume that these statutory conditions have been imposed on petitioner at all times since the state trial court stayed execution of his sentence.

The question presented for our decision is a narrow one: namely, whether the conditions imposed on petitioner as the price of his release constitute "custody" as that term is used in the habeas corpus statute. Respondent contends that the conditions imposed on petitioner are significantly less restrictive than those imposed on the petitioner in *Jones* v. *Cunningham,* 371 U. S. 236 (1963), where we held that a person released on parole is "in custody" for purposes of the district courts' habeas corpus jurisdiction. It is true, of course, that the parolee is generally subject to greater restrictions on his liberty of movement than a person released on bail or his own recognizance. And some lower courts have reasoned that this difference precludes an extension of the writ in cases such as the one before us.[5] On the other hand, a substantial number of courts, perhaps a majority, have concluded that a person released on bail or on his own recognizance may be "in custody" within the meaning of the statute.[6] In view of the analysis, which led to a finding of custody in *Jones* v. *Cunningham, supra,* we conclude that this latter line of cases reflects the sounder view.

While the "rhetoric celebrating habeas corpus has changed little over the centuries,"[7] it is nevertheless true that the functions of the writ have undergone dramatic change. Our recent decisions have reasoned from the premise that habeas corpus is not "a static, narrow, formalistic remedy," *Jones* v. *Cunningham, supra,* at 243, but one which must retain the "ability to cut through barriers of form and procedural mazes." *Harris* v. *Nelson,* 394 U. S. 286, 291 (1969). See *Frank* v. *Mangum,* 237 U. S. 309, 346 (1915) (Holmes, J., dissenting). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris* v. *Nelson, supra,* at 291.

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[5] See, *e. g., United States ex rel. Meyer* v. *Weil,* 458 F. 2d 1068 (CA7 1972); *Allen* v. *United States,* 349 F. 2d 362 (CA1 1965); *Application of Jackson,* 338 F. Supp. 1225 (WD Tenn. 1971); *United States ex rel. Granello* v. *Krueger,* 306 F. Supp. 1046 (EDNY 1969); *Moss* v. *Maryland,* 272 F. Supp. 371 (Md. 1967).

[6] See, *e. g., Capler* v. *City of Greenville,* 422 F. 2d 299, 301 (CA5 1970); *Marden* v. *Purdy,* 409 F. 2d 784, 785 (CA5 1969); *Beck* v. *Winters,* 407 F. 2d 125, 126–127 (CA8 1969); *Burris* v. *Ryan,* 397 F. 2d 553, 555 (CA7 1968); *United States ex rel. Smith* v. *DiBella,* 314 F. Supp. 446 (Conn. 1970); *Ouletta* v. *Sarver,* 307 F. Supp. 1099, 1101 n. 1 (ED Ark. 1970), aff'd, 428 F. 2d 804 (CA8 1970); *Cantillon* v. *Superior Court,* 305 F. Supp. 304, 306–307 (CD Cal. 1969); *Matzner* v. *Davenport,* 288 F. Supp. 636, 638 n. 1 (NJ 1968), aff'd, 410 F. 2d 1376 (CA3 1969); *Nash* v. *Purdy,* 283 F. Supp. 837, 838–839 (SD Fla. 1968); *Duncombe* v. *New York,* 267 F. Supp. 103, 109 n. 9 (SDNY 1967); *Foster* v. *Gilbert,* 264 F. Supp. 209, 211–212 (SD Fla. 1967). In addition, the Supreme Court of California has concluded that release on one's own recognizance under the laws of that State imposes "sufficient constructive custody" to permit an application for writ of habeas corpus. *In re Smiley,* 66 Cal. 2d 606, 613, 427 P. 2d 179, 183 (1967).

[7] Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1040 (1970).

Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. The demand for speed, flexibility, and simplicity is clearly evident in our decisions concerning the exhaustion doctrine, *Fay* v. *Noia,* 372 U. S. 391 (1963); *Brown* v. *Allen,* 344 U. S. 443 (1953); the criteria for relitigation of factual questions, *Townsend* v. *Sain,* 372 U. S. 293 (1963); the prematurity doctrine, *Peyton* v. *Rowe,* 391 U. S. 54 (1968); the choice of forum, *Braden* v. *30th Judicial Circuit Court of Ky.,* 410 U. S. 484 (1973); *Strait* v. *Laird,* 406 U. S. 341 (1972); and the procedural requirements of a habeas corpus hearing, *Harris* v. *Nelson, supra.* That same theme has indelibly marked our construction of the statute's custody requirement. See *Strait* v. *Laird, supra; Peyton* v. *Rowe, supra; Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Walker* v. *Wainwright,* 390 U. S. 335 (1968); *Jones* v. *Cunningham, supra.*[8]

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[8] Insofar as former decisions, *Stallings* v. *Splain,* 253 U. S. 339 (1920); *Johnson* v. *Hoy,* 227 U. S. 245 (1913); *Baker* v. *Grice,* 169 U. S. 284 (1898); *Wales* v. *Whitney,* 114 U. S. 564 (1885), may indicate a narrower reading of the custody requirement, they may no longer be deemed controlling. In none of the decisions on which we today rely, *Strait* v. *Laird, supra; Peyton* v. *Rowe, supra; Carafas* v. *LaVallee, supra; Jones* v. *Cunningham, supra,* are these earlier cases even cited in the opinions of the Court.

The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate. Applying that principle, we can only conclude that petitioner is in custody for purposes of the habeas corpus statute. First, he is subject to restraints "not shared by the public generally," *Jones* v. *Cunningham, supra,* at 240: that is, the obligation to appear "at all times and places as ordered" by "[a]ny court or magistrate of competent jurisdiction." Cal. Penal Code §§ 1318.4 (a), 1318.4 (c). He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on his liberty is surely no less severe than the conditions imposed on the unattached reserve officer whom we held to be "in custody" in *Strait* v. *Laird, supra.*[9]

Second, petitioner remains at large only by the grace of a stay entered first by the state trial court and then extended by two Justices of this Court. The State has emphatically indicated its determination to put him behind bars, and the State has taken every possible step to secure that result. His incarceration is not, in other words, a speculative possibility that depends on a number of contingencies over which he has no control. This is not a case where the unfolding of events may render the entire controversy academic. The petitioner has been forced to fend off the state authorities by means of a stay, and those authorities retain the determination and the power to seize him as soon as the obstacle of the stay is removed. The need to keep the stay in force is itself an unusual and substantial impairment of his liberty.

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[9] Similarly, in *Braden* v. *30th Judicial Circuit Court of Ky.,* 410 U. S. 484 (1973), where the Commonwealth of Kentucky had lodged a detainer against a prisoner in an Alabama jail, we held that the petitioner was in the custody of Kentucky officials for purposes of his habeas corpus action.

Moreover, our conclusion that the petitioner is presently in custody does not interfere with any significant interest of the State. Indeed, even if we were to accept respondent's argument that petitioner is not in custody, that result would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence.[10] It would still remain open to the District Court to order petitioner's release pending consideration of his habeas corpus claim. *In re Shuttlesworth,* 369 U. S. 35 (1962). Even if petitioner remained in jail only long enough to have his petition filed in the District Court, his release by order of the District Court would not jeopardize his "custody" for purposes of a habeas corpus action. *Carafas* v. *LaVallee, supra.*[11] Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim.

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[10] By contrast, a finding of no "custody" in *Carafas* v. *LaVallee, supra,* would not merely have postponed the exercise of habeas corpus jurisdiction, but would have barred it altogether. Similarly, if we had held in *Jones* v. *Cunningham, supra,* that a parolee is not in custody, then habeas corpus jurisdiction could not have been exercised until such time as release on parole was revoked. Cf. *Peyton* v. *Rowe, supra.*

[11] See *United States ex rel. Pon* v. *Esperdy,* 296 F. Supp. 726 (SDNY 1969); *Goldberg* v. *Hendrick,* 254 F. Supp. 286, 288–289 (ED Pa. 1966).

Finally, we emphasize that our decision does not open the doors of the district courts to the habeas corpus petitions of all persons released on bail or on their own recognizance. We are concerned here with a petitioner who has been convicted in state court and who has apparently exhausted all available state court opportunities to have that conviction set aside. Where a state defendant is released on bail or on his own recognizance pending trial or pending appeal, he must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the federal courts. Nothing in today's opinion alters the application of that doctrine to such a defendant.

Since the Court of Appeals erroneously concluded that petitioner was not "in custody" at the time his petition was filed, its judgment is reversed and the case is remanded to the District Court to consider his petition for a writ of habeas corpus.

Reversed and remanded.

MR. JUSTICE BLACKMUN, concurring in the result.

I emphasize again, as I did in my separate concurrence in *Braden* v. *30th Judicial Circuit Court of Ky.,* 410 U. S. 484, 501 (1973), that the Court has wandered a long way down the road in expanding traditional notions of habeas corpus. Indeed, the Court now concedes this. *Ante,* at 349. The present case is yet another step. Although recognizing that the custody requirement is designed to preserve the writ as a remedy for *severe* restraints on individual liberty, *ante*, at 351, the Court seems now to equate custody with almost any restraint, however tenuous. One wonders where the end is. Nevertheless, in the light of cases already decided by the Court, I feel compelled to go along and therefore concur in the result.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

The issue in this case is whether petitioner was in "custody," within the meaning of 28 U. S. C. § 2241, entitling him to the benefit of the extraordinary writ of habeas corpus. The Court of Appeals for the Ninth Circuit unanimously held that he was neither in actual nor constructive custody. If there is any vestige left of the obvious and the original meaning of "custody" the court below was right and the majority opinion of this Court today has further stretched both the letter and the rationale of the statute.

Petitioner has been free on his own recognizance since his conviction and the imposition of sentence in the summer of 1969. The California statute authorizing his release imposes no territorial or supervisory limitations and he has been subject to none. He has not been required to post any security for his appearance. At the time of the filing of his federal habeas petition, the only conceivable restraint on him was that at the time of the expiration of the stay granted by the state court, petitioner would have had to surrender himself to the custody of the sheriff. The record shows that for the three and one-half years since his conviction, petitioner has utilized his freedom to travel both within and without the State of California for business purposes.

Petitioner was under no greater restriction than one who had been subpoenaed to testify in court as a witness.

This is simply not "custody" in any known sense of the word, and it surely is not what was meant by Congress when it enacted 28 U. S. C. § 2241. The Court apparently feels, like Faust, that it has in its previous decisions already made its bargain with the devil, and it does not shy from this final step in the rewriting of the statute. I cannot agree, and I therefore dissent.

MOURNING *v.* FAMILY PUBLICATIONS SERVICE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-829. Argued November 9, 1972—Decided April 24, 1973

Petitioner, who contracted to purchase magazine subscriptions from respondent, brought this action in District Court, alleging that respondent had failed to comply with the disclosure provisions of the Truth in Lending Act, as implemented by Federal Reserve Board "Regulation Z." The District Court found that respondent had failed to comply with Regulation Z, in that respondent had extended credit to petitioner, payable in more than four installments, without making the disclosures required by the Act. The Court of Appeals reversed, holding that the Board had exceeded its statutory authority in issuing Regulation Z since the regulation required disclosure in some credit transactions in which a finance charge had not been made, and, alternatively, that the regulation violated due process by creating a conclusive presumption that credit payments made in more than four installments included a finance charge. *Held:*

1. The "Four Installment Rule" of Regulation Z is a valid exercise of the Federal Reserve Board's rulemaking authority under the Truth in Lending Act. Pp. 363-375.

(a) Congress, which was well aware that merchants could evade the disclosure requirements of the Act by concealing credit charges, gave the Board broad rulemaking power to prevent such evasion, and, in the exercise of that power, the Board issued the challenged rule to deal with the practice of concealing finance charges in the cash price of merchandise sold. Pp. 363-369.

(b) No conflict arises from the fact that the Act mentions disclosure only in regard to transactions in which a finance charge is imposed while the disclosure requirements of the rule sometimes apply where no such charge exists, since Congress did not attempt to specify all types of situations under which the Board's regulations might apply, and the deterrent effect of the rule clearly implements the objectives of the Act. Pp. 372-373.

(c) The Board had authority to promulgate a general rule to prevent circumvention, even if the rule embraces some transactions that the provisions of the Act might not on their face reach. *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365. Pp. 373–374.

(d) Existence of penalty provisions in the Act does not require a narrow construction of the Act's nonpenalty provisions. *FCC* v. *American Broadcasting Co.,* 347 U. S. 284, distinguished. Pp. 374–375.

2. Imposition, pursuant to § 130 of the Act, of a minimum penalty of $100 in cases such as this where the finance charge is nonexistent or undetermined, but where disclosure has not been made, is a permissible sanction. P. 376.

3. In imposing a disclosure requirement on all members of a defined class to discourage evasion by a substantial portion of that class, the challenged regulation does not create a conclusive presumption violative of the Fifth Amendment. Pp. 376–377.

449 F. 2d 235, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which STEWART and REHNQUIST, JJ., joined, *post,* p. 378. POWELL, J., filed a dissenting opinion, *post,* p. 383.

Eric Schnapper argued the cause for petitioner. With him on the briefs were *Jack Greenberg, James M. Nabrit III, M. Donald Drescher,* and *Leonard Helfand.*

Robert S. Rifkind argued the cause for respondent. With him on the brief were *William S. Frates* and *Larry S. Stewart.*

A. Raymond Randolph, Jr., argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wood, Alan S. Rosenthal,* and *Greer S. Goldman.*[*]

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[*] *Edward Donald Foster, Richard A. Hesse,* and *Blair C. Shick* filed a brief for the National Consumer Law Center, Inc., as *amicus curiae* urging reversal.

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted the writ of certiorari in this case to resolve whether the Federal Reserve Board exceeded its authority under § 105 of the Truth in Lending Act [1] in promulgating that portion of Regulation Z commonly referred to as the "Four Installment Rule." [2]

Respondent is a Delaware corporation which solicits subscriptions to several well-known periodicals. In 1969, one of respondent's door-to-door salesmen called on the petitioner, a 73-year-old widow residing in Florida, and sold her a five-year subscription to four magazines. Petitioner agreed to pay $3.95 immediately and to remit a similar amount monthly for 30 months. The contract form she signed contained a clause stating that the subscriptions could not be canceled and an acceleration provision similar to that found in many installment undertakings, providing that any default in installment payments would render the entire balance due. The contract did not recite the total purchase price of the subscriptions or the amount which remained unpaid after the initial remittance, and made no reference to service or finance charges. The total debt assumed by the petitioner was $122.45; the balance due after the initial payment was $118.50.

Petitioner made the initial payment, began to receive the magazines for which she had contracted, and then defaulted. Respondent declared the entire balance of $118.50 due and threatened legal action. Petitioner brought this suit in United States District Court, alleging that respondent had failed to comply with the disclosure provisions of the Truth in Lending Act. She sought recovery of the statutory penalty and reimbursement for the costs of the litigation, including reasonable attorney's fees.

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[1] 82 Stat. 148, 15 U. S. C. § 1604.

[2] 12 CFR § 226.2 (k) (1972 rev.).

In support of her claim, petitioner submitted to the District Court a series of "dunning" letters which she had received from respondent. One letter, dated December 16, 1969, stated:

> "After making the terms of our contract clear to you, we went ahead in good faith and had your subscriptions entered for the entire periods you had agreed to take. The contract you signed is: Not subject to cancellation after acceptance or verification.
>
> "Knowing, therefore, the obligations we have incurred in your name, we feel confident that you will continue your magazine subscriptions and make the convenient monthly payments regularly and promptly."[3]

A second letter, received a week later from respondent's agent, declared:

> "After an account is three months delinquent it is brought to my attention. I feel that you should realize that you are receiving our merchandise which we have paid for. *Had you dealt directly with the publishers yourself, you would have had to pay them in advance for the magazines.*
>
> "Again, let me remind you that we have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account, and as such must be repaid by you on a monthly basis,* much the same as if you had purchased any other type of merchandise on a monthly

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[3] App. 21.

> budget plan. [Emphasis supplied; underlined words are emphasized in the original letter]."[4]

Respondent admitted sending each of the above letters to petitioner.[5] In addition, respondent submitted one affidavit to the District Court, describing the nature of the contracts which it offered to its clients. The affidavit stated that a customer who ordered magazine subscriptions from respondent was required to pay for all magazines during the first half of the contract term.[6] Thus, according to the affidavit, at all times during the course of a contract, a purchaser who has complied with the terms of the contract has paid for more magazines than he has received. Respondent did not, however, submit any affidavit to the court contesting any of the facts stated in its "dunning" letters. On this record, both parties moved for summary judgment, declaring explicitly that no factual question remained undecided.

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[4] App. 20.

[5] Petitioner also submitted to the court a letter sent to her legal counsel by respondent's office manager. The letter stated:

"Whereas, FPS, acts initialy [*sic*] as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier, and co-guaranter [*sic*] of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refund in part or full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract until fullfilment [*sic*] of said terms in the aforementioned contract result [*sic*] in mutual resolve [*sic*] of liability." App. 14.

Respondent admitted that this letter had been written on its stationery by its employee, but denied that the employee was authorized to send it. Consequently, we do not consider the facts stated in the letter to have been admitted by respondent.

[6] Affidavit of Stanley R. Swanson, Vice President of Family Publications Service, Inc., Aug. 26, 1970, p. 2 (District Court Record 198, 199). The affidavit also stated that, while customers of respondent were free to pay the entire price of their magazine subscriptions when their contract with respondent was signed, the price charged would be equal to the aggregate of the payments that would have been made had the customer elected to pay in installments. Respondent now admits that this statement was not true. In some cases, customers who agreed to pay the entire contract price immediately were charged less than the aggregate amount of the installment payments.

Section 121 of the Truth in Lending Act requires merchants who regularly extend credit, with attendant finance charges,[7] to disclose certain contract information "to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed . . . ."[8] Among other relevant facts, the merchant must, where applicable, list the cash price of the merchandise or service sold, the amount of finance and other charges, and the rate of the charges.[9] Failure to disclose renders the seller liable to the consumer for a penalty of twice the amount of the finance charge, but in no event less than $100 or more than $1,000.[10] The creditor may also be assessed for the costs of the litigation, including reasonable attorney's fees[11] and, in certain circumstances not relevant here, may be the subject of criminal charges.[12]

Section 105 of the Act[13] provides:

> "The [Federal Reserve] Board shall prescribe regulations to carry out the purposes of [the Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board

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[7] § 103 (f), 15 U. S. C. § 1602 (f). Certain transactions, not here relevant, are exempt under § 104, 15 U. S. C. § 1603.

[8] 15 U. S. C. § 1631.

[9] § 128, 15 U. S. C. § 1638.

[10] § 130, 15 U. S. C. § 1640.

[11] *Ibid.*

[12] § 112, 15 U. S. C. § 1611.

[13] 15 U. S. C. § 1604.

> are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith."

Accordingly, the Board has promulgated Regulation Z, which defines the circumstances in which a seller who regularly extends credit must make the disclosures outlined in § 128.[14] The regulation provides that disclosure is necessary whenever credit is offered to a consumer "for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments." [15]

Relying on the rule governing credit transactions of more than four installments, the District Court granted summary judgment for petitioner. The court found that respondent had extended credit to petitioner,[16] which by agreement was payable in more than four installments, but had failed to comply with the disclosure provisions of the Act.

The Court of Appeals reversed, holding that the Board had exceeded its statutory authority in promulgating the regulation upon which the District Court relied. The regulation was found to conflict with § 121 of the Act [17] since it required that disclosure be made in regard to some credit transactions in which a finance charge had not been imposed. As an alternative ground for its decision, the Court of Appeals held that the regulation created a conclusive presumption that credit payments made in more than four installments included a finance charge. Relying on *Schlesinger* v. *Wisconsin,* 270 U. S. 230 (1926), and *Heiner* v. *Donnan,* 285 U. S. 312 (1932), the court concluded that such an irrebuttable presumption of fact violated the Due Process Clause of the Fifth Amendment.

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[14] 15 U. S. C. § 1638.

[15] 12 CFR § 226.2 (k) (1972 rev.).

[16] Respondent challenges the finding of the District Court that credit was extended to petitioner. In some cases in which a consumer pays in installments for a magazine subscription, credit may not have been extended to the consumer. However, in view of the admissions by respondent which were before the District Court, respondent's failure to controvert those admissions by affidavit, and the litigation posture which respondent has consistently maintained beginning in the District Court, *i. e.,* that no factual matters remained unresolved, we conclude that summary judgment on this issue was properly granted. Fed. Rule Civ. Proc. 56 (e).

[17] 15 U. S. C. § 1631.

I

Passage of the Truth in Lending Act in 1968 culminated several years of congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market. By the time of passage, it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate. From the end of World War II through 1967, the amount of such credit outstanding had increased from $5.6 billion to $95.9 billion, a rate of growth more than 4½ times as great as that of the economy.[18] Yet, as the congressional hearings revealed, consumers remained remarkably ignorant of the nature of their credit obligations and of the costs of deferring payment.[19] Because of the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet.[20] Joseph Barr, then Under Secretary of the Treasury, noted in testifying before a Senate subcommittee that such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired material at the lowest cost is dependent on the asserted preferences and informed choices of consumers.[21]

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[18] H. R. Rep. No. 1040, 90th Cong., 1st Sess., 10–11 (1967).

[19] *Id.,* at 13; S. Rep. No. 392, 90th Cong., 1st Sess., 2–3 (1967).

[20] H. R. Rep. No. 1040, *supra,* n. 18, at 13; S. Rep. No. 392, *supra,* n. 19, at 1–2.

The Truth in Lending Act was designed to remedy the problems which had developed. The House Committee on Banking and Currency reported, in regard to the then proposed legislation:

> "[B]y requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." [22]

This purpose was stated explicitly in § 102 of the legislation enacted:

> "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to

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[21] Hearings on H. R. 11601 before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 90th Cong., 1st Sess., pt. 1, p. 76 (1967).

[22] H. R. Rep. No. 1040, *supra*, n. 18, at 13.

> compare more readily the various credit terms available to him and avoid the uninformed use of credit." [23]

The hearings held by Congress reflect the difficulty of the task it sought to accomplish. Whatever legislation was passed had to deal not only with the myriad forms in which credit transactions then occurred, but also with those which would be devised in the future.[24] To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. The language employed evinces the awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish. It indicates as well the clear desire of Congress to insure that the Board had adequate power to deal with such attempted evasion. In addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to "carry out the purposes" of the Act, Congress specifically provided, as noted earlier, that the regulations may define classifications and exceptions to insure compliance with the Act.[25]

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[23] 15 U. S. C. § 1601.

[24] See letter from Paul R. Dixon, Chairman of the Federal Trade Commission, to Senator A. Willis Robertson, Chairman of the Senate Committee on Banking and Currency, Feb. 18, 1964, in Hearings on S. 750 before the Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency, 88th Cong., 1st and 2d Sess., pt. 2, p. 1303 (1963–1964).

[25] 15 U. S. C. § 1604.

See *supra,* at 361–362. The Board was thereby empowered to define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled, no matter what adroit or unscrupulous practices were employed by those extending credit to consumers.

One means of circumventing the objectives of the Truth in Lending Act, as passed by Congress, was that of "burying" the cost of credit in the price of goods sold. Thus in many credit transactions in which creditors claimed that no finance charge had been imposed, the creditor merely assumed the cost of extending credit as an expense of doing business, to be recouped as part of the price charged in the transaction.[26] Congress was well aware, from its extensive studies, of the possibility that merchants could use such devices to evade the disclosure requirements of the Act. The Committee hearings are replete with suggestions that such manipulation would render the Act a futile gesture in the case of goods normally sold by installment contract.[27] Opponents of the bill contended that the reporting provisions would actually encourage merchants who had formerly segregated their credit costs not to do so. They predicted that the effect of the Act would thus be to reduce the amount of information available to the consumer, a result directly contrary to that which was intended.[28] Proponents of the legislation claimed that the Act would enhance the consumer's ability to make an informed choice even if finance charges were hidden. In response to a claim that credit costs would be incorporated in the price of goods, Senator Douglas, who first proposed the Truth in Lending Act, stated:

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[26] For example, two merchants might buy watches at wholesale for $20 which normally sell at retail for $40. Both might sell immediately to a consumer who agreed to pay $1 per week for 52 weeks. In one case, the merchant might claim that the price of the watch was $40 and that the remaining $12 constituted a charge for extending credit to the consumer. From the consumer's point of view, the credit charge represents the cost which he must pay for the privilege of deferring payment of the debt he has incurred. From the creditor's point of view, much simplified, the charge may represent the return which he might have earned had he been able to invest the proceeds from the sale of the watch from the date of the sale until the date of payment. The second merchant might claim that the price of the watch was $52 and that credit was free. The second merchant, like the first, has forgone the profits which he might have achieved by investing the sale proceeds from the day of the sale on. The second merchant may be said to have "buried" this cost in the price of the item sold. By whatever name, the $12 differential between the total payments and the price at which the merchandise could have been acquired is the cost of deferring payment.

> "I would like to call to your attention, Senator, for purposes of the record, that this bill does not provide for judgment solely on the basis of the . . . annual interest rate or the total finance charges. It also provides that there shall be a statement of the

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[27] Hearings on S. 1740 before the Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency, 87th Cong., 1st Sess., 49, 56–57, 127, 389–390, 447–448, 563, 1155–1156 (1961); Hearings on S. 1740 before the Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency, 87th Cong., 2d Sess., 16, 45, 265, 267–268, 287, 341–342, 360–361, 365–367, 376, 407, 415 (1962); Senate Hearings on S. 750, 88th Cong., 1st and 2d Sess., *supra,* n. 24, pts. 1 and 2, pp. 13–14, 749, 1284–1285; Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 41–42, 123–134, 377–379, 513, 699 (1967); House Hearings on H. R. 11601, 90th Cong., 1st Sess., *supra,* n. 21, pts. 1 and 2, pp. 583, 590–591, 802, 825–826.

[28] Senate Hearings on S. 1740, 87th Cong., 2d Sess., *supra,* n. 27, at 287; Senate Hearings on S. 750, 88th Cong., 1st and 2d Sess., *supra,* n. 24, pt. 1, pp. 13–14; House Hearings on H. R. 11601, 90th Cong., 1st Sess., *supra,* n. 21, pt. 2, p. 596.

> cash price or delivery price of the property or service to be acquired. Both things are to be stated, price and finance charges, and the judgment of the consumer can be on the basis of both of these factors, not merely on one alone; and if a merchant tries to have a low finance charge and bury it in a high cash price or delivered price, then the purchaser can shop on price just as much as on the finance charges." [29]

It was against this legislative background that the Federal Reserve Board promulgated regulations governing enforcement of the Truth in Lending Act. In September 1968, with the aid of an advisory board composed of representatives of diverse retail, lending, and consumer groups, the Board compiled and released a draft of proposed regulations.[30] Comments and criticisms from interested parties were invited. After more than 1,800 responses were received and considered by the Board, the regulations were reviewed and published in the Federal Register.[31]

The Four Installment Rule was included in the original published draft of the regulations and was not amended prior to its final adoption.[32] The Board's objective in promulgating the rule was to prevent the Act from fulfilling the prophecy which its opponents had forecast. As J. L. Robertson, vice chairman of the Board of Governors, stated in an advisory letter issued a year later:

> "The Board felt that it was imperative to include transactions involving more than four instalments

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[29] Senate Hearings on S. 1740, 87th Cong., 1st Sess., *supra*, n. 27, at 447-448. See also Senate Hearings on S. 1740, 87th Cong., 2d Sess., *supra*, n. 27, at 45.

[30] 33 Fed. Reg. 15506-15516 (1968).

[31] 34 Fed. Reg. 2002-2011 (1969).

[32] Compare § 226.2 (h), 33 Fed. Reg. 15507 (1968), with § 226.2 (k), 34 Fed. Reg. 2003 (1969).

> under the Regulation since without this provision the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would have been encouraged by Truth in Lending. Obviously this would have been directly contrary to Congressional intent." [33]

Furthermore, even as to sales in which it was impossible to determine what, if any, portion of the price recompensed the creditor for deferring payment, the regulation at least required that the consumer be provided with some information which would enable him to make an informed economic choice.[34]

II

The standard to be applied in determining whether the Board exceeded the authority delegated to it under the Truth in Lending Act is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," [35] we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of the City of Durham,* 393 U. S. 268, 280–281 (1969). See also *American Trucking Assns.* v. *United States,* 344 U. S. 298 (1953).

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[33] Federal Reserve Board Advisory Letter of Mar. 3, 1970, by J. L. Robertson. See also Federal Reserve Board Advisory Letter of Aug. 26, 1969, by J. L. Robertson.

[34] Statement of J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System, in Hearings on Consumer Credit Regulations before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 91st Cong., 1st Sess., pt. 2, pp. 380–381 (1969).

[35] *E. g.,* § 8 of the United States Housing Act of 1937, as amended, 42 U. S. C. § 1408.

We have also construed enabling provisions similar to § 105 of the Truth in Lending Act, in which Congress has stressed the agency's power to counteract attempts to evade the purposes of a statute. In *Gemsco, Inc.* v. *Walling,* 324 U. S. 244 (1945), we were asked to determine whether the Administrator of the Wage and Hour Division of the Department of Labor was empowered under the Fair Labor Standards Act of 1938 [36] to prohibit companies from allowing or requiring their employees to do industrial homework. The Act required the Administrator to approve orders which were designed to raise the minimum wage to 40 cents an hour. While the Act did not specifically mention industrial homework, § 8 (f) stated that the Administrator's orders

> "shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." [37]

After hearings, the Administrator determined that homework furnished "a ready means" of evading his orders, and prohibited certain companies subject thereto from employing this means of production. The Court concluded that the Administrator had not exceeded his authority under the Act, noting that a more restrictive interpretation of the enabling provision would have rendered the Act inoperable. Focusing on the mandate provided by § 8 (f), the Court stated:

> "When command is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short of express limitation or abuse of discretion in finding that the necessity exists should undermine the action taken to execute it. When

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[36] 52 Stat. 1060.

[37] 52 Stat. 1065.

> neither such limitation nor such abuse exists, but the necessity is conceded to be well founded in fact, there would seem to be an end of the matter." 324 U. S., at 255.

In light of our prior holdings and the legislative history of the Truth in Lending Act, we cannot agree with the conclusion of the Court of Appeals that the Board exceeded its statutory authority in promulgating the Four Installment Rule. Congress was clearly aware that merchants could evade the reporting requirements of the Act by concealing credit charges. In delegating rulemaking authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware. As in *Gemsco*, the language of the enabling provision precludes us from accepting so narrow an interpretation of the Board's power.

Given that some remedial measure was authorized, the question remaining is whether the measure chosen is reasonably related to its objectives. We see no reason to doubt the Board's conclusion that the rule will deter creditors from engaging in the conduct which the Board sought to eliminate. The burdens imposed on creditors are not severe, when measured against the evils which are avoided. Furthermore, were it possible or financially feasible to delve into the intricacies of every credit transaction, it is clear that many creditors to whom the rule applies would be found to have charged for deferring payment, while claiming they had not. That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. *Northwestern Co.* v. *FPC,* 321 U. S. 119, 124 (1944); *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 224 (1943); *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, 236 (1936).

Respondent contends, however, that the Four Installment Rule must be abrogated since it is "inconsistent" with portions of the enabling statute. The purported conflict arises because the statute specifically mentions disclosure only in regard to transactions in which a finance charge is in fact imposed,[38] although the rule requires disclosure in some cases in which no such charge exists. Respondent argues that, in requiring disclosure as to some transactions, Congress intended to preclude the Board from imposing similar requirements as to any other transactions.

To accept respondent's argument would undermine the flexibility sought in vesting broad rulemaking authority in an administrative agency. In *American Trucking Assns.* v. *United States, supra,* we noted that it was not

> "a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. . . . [N]o great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that

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[38] § 103 (f), 15 U. S. C. § 1602 (f); § 121, 15 U. S. C. § 1631; § 130 (a), 15 U. S. C. § 1640 (a).

> they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess." 344 U. S., at 309–310 (citations omitted).

Neither the sections of the Truth in Lending Act which refer specifically to transactions involving finance charges nor any other sections of the Act indicate that Congress attempted to list comprehensively all types of transactions to which the Board's regulations might apply. To the contrary, § 105's broad grant of rulemaking authority reflects an intention to rely on those attributes of agency administration recognized in *American Trucking.* We cannot then infer that references in the Act to transactions involving credit charges were intended to limit the deterrent measures which the Board might choose.

Since the deterrent effect of the challenged rule clearly implements the objectives of the Act, respondent's contention is reduced to a claim that the rule is void because it requires disclosure by some creditors who do not charge for credit and thus need not be deterred. The fact that the regulation may affect such individuals does not impair its otherwise valid purpose. A similar contention was made in *Gemsco,* and rejected by the Court. Gemsco claimed that the Administrator was not attempting to enforce the requirements of the statute but was attempting to advance "experimental social legislation" which Congress had not approved. Responding to that argument the Court stated:

> "Section 8 (f), in directing the Administrator to include 'such terms and conditions' as he 'finds necessary to carry out the purposes of such orders,' did not forbid him to take the only measures which would be effective, merely because other consequences necessarily would follow. The language neither states

> expressly nor implies that he is to do only what will achieve the stated ends and nothing more. The statute does not direct the Administrator to make the rate effective by all necessary means except those which may have other social or economic consequences." 324 U. S., at 257.

There the Court was referring to the regulation of subject matter not specifically mentioned in the enabling legislation. A similar rule applies when a remedial provision requires some individuals to submit to regulation who do not participate in the conduct the legislation was intended to deter or control. In *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388–389 (1926), the Court held that, in defining a class subject to regulation, "[t]he inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." See also *North American Co.* v. *SEC,* 327 U. S. 686 (1946). Nothing less will meet the demands of our complex economic system. Where, as here, the transactions or conduct which Congress seeks to administer occur in myriad and changing forms, a requirement that a line be drawn which insures that not one blameless individual will be subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely. That this rationale applies to administrative agencies as well as to legislatures is implicit in both *Gemsco* and *American Trucking Assns.* In neither case was every individual engaged in the regulated activity responsible for the specific consequences the agency sought to eliminate.

Respondent argues that such an interpretation of the Truth in Lending Act is inconsistent with our holding in *FCC* v. *American Broadcasting Co.,* 347 U. S. 284 (1954). In that case, the Court considered whether, in establishing regulations to govern programing, the FCC had properly interpreted a criminal provision prohibiting the broadcasting of lotteries. After noting that a given statute could not be construed one way for purposes of an administrative proceeding and another for criminal prosecution, the Court stated:

> "If we should give [the criminal provision] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases." *Id.*, at 296.

Since, in drafting its regulation, the Commission had failed to apply the well-established rule that penal provisions must be construed narrowly, the Court held the regulation invalid.

Relying on *American Broadcasting,* respondent contends that the Truth in Lending Act must be construed narrowly since it contains penal provisions,[39] and that a narrow interpretation requires that the Board's rule be nullified. We cannot agree, however, that every section of an act establishing a broad regulatory scheme must be construed as a "penal" provision, as that term is used in *American Broadcasting,* merely because two sections of the Act provide for civil and criminal penalties. Penal statutes are construed narrowly to insure that no individual is convicted unless "a fair warning [has first been] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle* v. *United States,* 283 U. S. 25, 27 (1931).[40] Where, as here, the language of the challenged rule is explicit, that risk is not present. See *Kraus & Bros., Inc.* v. *United States,* 327 U. S. 614, 621-622 (1946).

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[39] § 112, 15 U. S. C. § 1611; § 130, 15 U. S. C. § 1640.

[40] See *Kordel* v. *United States,* 335 U. S. 345 (1948). See also W. LaFave & A. Scott, Criminal Law 72 (1972).

We are also unable to accept respondent's argument that § 130[41] does not allow imposition of a civil penalty in cases where no finance charge is involved but where a regulation requiring disclosure has been violated. Section 130 provides that the penalty assessed shall be twice the amount of the finance charge imposed, but not less than $100. Since the civil penalty prescribed is modest and the prohibited conduct clearly set out in the regulation, we need not construe this section as narrowly as a criminal statute providing graver penalties, such as prison terms. We have noted above that the objective sought in delegating rulemaking authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem. Congress cannot then be required to tailor civil penalty provisions so as to deal precisely with each step which the agency thereafter finds necessary. In light of the emphasis Congress placed on agency rulemaking and on private and administrative enforcement of the Act, we cannot conclude that Congress intended those who failed to comply with regulations to be subject to no penalty or to criminal penalties alone. As the District Court concluded, imposition of the minimum sanction is proper in cases such as this, where the finance charge is nonexistent or undetermined.

Finally, the Four Installment Rule does not conflict with the Fifth Amendment under our holdings in *Schlesinger* v. *Wisconsin,* 270 U. S. 230 (1926), and

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[41] 15 U. S. C. § 1640. This section refers only to the failure to provide "information required *under this part* to be disclosed . . . ." (Emphasis supplied.) The italicized language was added to the statute to distinguish disclosure required in regard to sales transactions from that required in regard to advertising. H. R. Rep. No. 1040, *supra,* n. 18, at 19, 30. The penalty provision applies both to the failure to disclose information specifically required by the statute and to the failure to abide by regulations promulgated by the Board to govern such disclosure.

Heiner v. *Donnan,* 285 U. S. 312 (1932). In *Schlesinger* and *Heiner,* we held that certain taxing provisions violated the Due Process Clauses of the Fifth and Fourteenth Amendments because they conclusively presumed the existence of determinative facts. The challenged rule contains no comparable presumption. The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges,[42] but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class.

The Truth in Lending Act reflects a transition in congressional policy from a philosophy of "Let the buyer beware" to one of "Let the seller disclose." By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought "to . . . avoid the uninformed use of credit." 15 U. S. C. § 1601. Some may claim that it is a relatively easy matter to calculate the total payments to which petitioner was committed by her contract with respondent; but at the time of sale, such computations are often not encouraged by the solicitor or performed by the purchaser. Congress has determined that such purchasers are in need of protection; the Four Installment Rule serves to insure that the protective disclosure mechanism chosen by Congress will not be circumvented.

That the approach taken may reflect what respondent views as an undue paternalistic concern for the consumer is beside the point. The statutory scheme is within the power granted to Congress under the Commerce Clause.

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[42] In regard to some transactions to which the Four Installment Rule applies, merchants need not report the amount and rate of finance charges. Federal Reserve Board Advisory Letter of July 24, 1969, by J. L. Robertson; Federal Reserve Board Letter No. 30, July 8, 1969, by Frederic Solomon.

It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.

Reversed and remanded.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST concur, dissenting in part.

I have concluded that this is not a proper case for summary judgment under Fed. Rule Civ. Proc. 56 (c), which provides that summary judgment only may be granted if there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." As I interpret the present record in light of our decisions, see, *e. g., Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144; *White Motor Co.* v. *United States,* 372 U. S. 253; *United States* v. *Diebold, Inc.,* 369 U. S. 654, there remains unresolved a genuine issue of material fact. Although I agree with the majority that Regulation Z is valid and accordingly would reverse the decision of the Court of Appeals, I would remand this case to the District Court for resolution of that material issue.

The disclosure provisions of the Truth in Lending Act apply only to an extension of "consumer credit." 15 U. S. C. § 1631. Thus, in order to assert successfully a claim under the Act for the statutory penalty and reimbursement for the costs of the action, see *id.,* § 1640, petitioner, *inter alia,* must satisfy her burden of proving that respondent extended consumer credit within the meaning of the Act. Section 103 (e) of the Act, 15 U. S. C. § 1602 (e), defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." In her complaint, petitioner merely alleges that respondent "extends Consumer Credit as defined in Regulation Z, 12 C. F. R. [§] 226.2

(K) . . . ." Respondent denies in its answer that its contract with petitioner involved a "credit transaction." In one paragraph respondent avers: "Under the contract executed by the customer and Defendant, the customer agrees to pay a stated amount per month for half of the life of the contract and Defendant agrees to supply the magazines for the full term of the contract. At all times the customer has prepaid for the magazines to be delivered. Under its arrangement with most of the publishers, Defendant reimburses the publisher periodically during the full term of the subscription." In another paragraph it avers: "At no point during the life of the contract has Defendant paid money to a third person or supplied goods or services to the customer for which reimbursement is expected from the customer in the future."

On the basis solely of these allegations, one would conclude that the contract between the petitioner and the respondent did not constitute a credit transaction. If respondent merely collected $3.95 per month from each customer and sent the receipts periodically to the publisher,[1] less the respondent's commission, respondent never would have made any advances for the customer, and the customer would owe nothing to the respondent for the loan of money or, in the words of the Act, as a "finance charge." On the other hand, if respondent advanced all or part of the subscription price to the publishers, respondent would be advancing "credit" for the benefit of the customer.[2] The legislative history indicates that "the disclosure requirement would not apply to transactions which are not commonly thought of as credit transactions . . . ."[3] As Professor Corbin has stated: "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without promising to render any performance in advance of full payment of the price of each instalment so rendered."[4] The Act, in defining "credit," refers to the deferred payment of a "debt." A debt, however, is more than a binding contractual obligation to pay a sum of money in the future upon the performance of certain conditions by the other party to the contract. It is an unconditional obligation to pay.[5] Thus, in my view, a proper resolution of the issue whether respondent extended credit to petitioner depends, at least in part, on the contractual relationships between the respondent and the publishers. The contracts between respondent and the publishers are not in the present record.[6]

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[1] There are suggestions in the record that respondent is a wholly owned subsidiary of Time, Inc. Respondent, however, sold not only Life, a Time, Inc., publication, but magazines of other publishers.

[2] In a free-enterprise system, one must presume that there is a "finance charge" for the advance of credit. It would nonetheless be a "finance charge" although it were wholly undisclosed or not separately stated in an account rendered to the customer.

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[3] S. Rep. No. 392, 90th Cong., 1st Sess., 14; H. R. Rep. No. 1040, 90th Cong., 1st Sess., 25.

[4] 3A A. Corbin, Contracts § 687, p. 246 (1960). A published opinion of the Federal Reserve Board recognizes that installment payment plans may not involve an extension of credit when charges for services rendered do not exceed prior payments. FRB Opinion Letter No. 262 (1970).

[5] 3A A. Corbin, Contracts § 691 (1960).

[6] My Brother POWELL asserts that, given the undisputed fact that petitioner agreed to pay in advance, respondent as a matter of law could not have extended credit. *Post,* at 383–384. We do not, however, know what the financial relationships in this *tripartite* arrangement are. For example, it may be that respondent advances the full five-year subscription price to the publisher on the subscriber's behalf when the contract between the subscriber and respondent is executed. If that is so, the subscriber may receive an *unconditional* right to receive magazines from the publisher over the five-year period, whether or not he meets his contractual obligations with respondent. Under these circumstances, respondent will be acting as a financier,

The pleadings, of course, are not the only papers to be considered by the District Court in determining whether one party or the other is entitled to summary judgment. Under Rule 56 (c) the court must consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . ." During the collection period, respondent had sent petitioner a dunning letter reminding her "that we have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account*, and as such must be repaid by you on a monthly basis, much the same as if you had purchased any other type of merchandise on a monthly budget plan." Respondent formally admitted that it had sent this letter to petitioner. Accordingly, it was properly considered by the District Judge.[7] But, I do not view this "ad-

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enabling the subscriber to take advantage of the publisher's five-year subscription offer, but yet to defer payment on the subscription price. Any "profit" respondent receives will be largely attributable to its services as a financier. I do not see that such a financial arrangement differs substantially from the case where a subscriber borrows the full subscription price from a bank and pays the publisher directly, obligating himself to repay the bank in equal installments, with interest, over two and one-half years. As my Brother POWELL argues, the subscriber under those circumstances will be advancing credit to the publisher because he has paid for all magazines in advance, but it cannot be doubted that at the same time the bank has advanced credit to the subscriber.

[7] Respondent mailed another letter to petitioner which stated: "Whereas, FPS, acts initialy [*sic*] as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier, and co-guaranter [*sic*] of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refund in part or full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract . . . ."

Although respondent admitted that the letter appeared on its stationery and was written by an employee, it denied that the employee mission" as conclusive or sufficient proof that respondent had extended credit within the meaning of the Act at the time the contract between petitioner and respondent was entered into.[8] First, this is not an admission in terms that credit was extended within the meaning of the Act. Second, since petitioner at the time the letter was sent was three months in arrears, it may be that respondent had advanced money on her account only after she failed to meet her contractual obligation. It is settled under our decisions that material lodged by the moving party "must be viewed in the light most favorable to the opposing party." *Adickes* v. *Kress & Co.,* 398 U. S., at 157, 158–159; *United States* v. *Diebold, Inc.,* 369 U. S., at 655.

Respondent is not deprived of the benefit of this principle of interpretation merely because it did not file an affidavit controverting the contents of the letter. Rule 56 (e) provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." The Advisory Committee note on the amendment which added this provision to the Rule, however, stated that "[w]here the evidentiary matter in support of the mo-

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was authorized to send the letter. Accordingly, since there was an issue of fact whether the letter was authorized and thus a binding admission, the letter could not be considered properly on petitioner's motion for summary judgment. Cf. 3 W. Barron & A. Holtzoff, Federal Practice and Procedure § 1231, p. 75 (1971 Supp.).

[8] We need not resolve here whether, if the contract was not originally a credit transaction, petitioner's own breach could have converted it retroactively into a credit transaction within the meaning of the Act.

tion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." We cited this comment with approval in *Adickes* v. *Kress & Co., supra,* at 160. The moving party, in this case petitioner,[9] must meet her burden of showing the absence of a genuine issue as to any material fact. *Id.,* at 157. I cannot conclude that she met that burden. The District Judge was not possessed of sufficient information to resolve properly the issue whether credit had been extended. Under these circumstances, he should not have granted summary judgment. Cf. *White Motor Co.* v. *United States,* 372 U. S., at 263.

MR. JUSTICE POWELL, dissenting.

I would affirm the judgment of the Court of Appeals on the ground that there was no extension of consumer credit within the meaning of the Truth in Lending Act.[1] The majority takes the position that the credit issue is a question of fact properly resolved against respondent on petitioner's motion for summary judgment below. I cannot agree. In my view, the undisputed facts establish as a matter of law that the transaction between petitioner and respondent did not involve an extension of consumer credit. For the same reason, while I am in agreement with much of MR. JUSTICE DOUGLAS' dissenting opinion, I see no reason to remand the case for the taking of evidence.

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[9] Both parties moved for summary judgment. That does not relieve the District Judge of his responsibility to consider each motion separately in light of the theories advanced by each party and to proceed to trial if he concludes that there is a genuine issue of material fact to be resolved. See 6 J. Moore, Federal Practice ¶ 56.13 (2d ed. 1972).

[1] Having this view of the case, I find it unnecessary to address the other two issues, namely: (i) whether the Federal Reserve Board exceeded its authority in adopting Regulation Z, which extends the coverage of the Act to transactions in which no finance charge can be identified; and (ii) whether the civil penalty provision of 15 U. S. C. § 1640 (a) may validly be imposed in a case where, by concession of the parties on cross-motions for summary judgment, the transaction does not involve a finance charge.

I

Clearly the Act applies only to transactions involving the extension of credit. The congressional declaration of purpose is explicit:

> "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit." 15 U. S. C. § 1601.

The phrase "extension of consumer credit" is not defined in the Act. Nor does the Act's definition of "credit" provide any enlightenment.[2] However, a transaction is commonly understood to involve credit when one party receives value in exchange for his unconditional promise to pay the other party for such value in the future. The mere fact that a party obligates himself in a contract to pay for goods or services in installments over a period of time does not render the contract a credit transaction:

> "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without prom-

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[2] "The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U. S. C. § 1602 (e). The Act provides no gloss on the terms "debtor" and "debt," and the definition of "creditor" is limiting rather than explanatory. ("The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required . . . ." 15 U. S. C. § 1602 (f).)

> ising to render any performance in advance of full payment of the price of each instalment so rendered." 3A A. Corbin, Contracts § 687, p. 246 (1960).

The transaction before the Court may well have been a credit transaction, but it was not *respondent* that extended the credit. Petitioner obligated herself to pay in advance for the magazines she was to receive. The contract required petitioner to pay equal installments over a 30-month period, but respondent was obligated only to provide magazines over 60 months. In effect, petitioner paid every month for two months' worth of magazines. Until the last magazine had been delivered, petitioner would have paid for more magazines than she received. Thus, the contract called for the extension of credit by petitioner to respondent. For this reason it was not an "extension of consumer credit" within the meaning of the Act. See 15 U. S. C. § 1602 (h).

The Federal Reserve Board, upon whose authority to interpret the Act the majority so heavily relies in sustaining Regulation Z, has indicated that a necessary element in a consumer credit transaction is the consumer's obligation to pay *after* he has received the bargained-for goods or services. In a published Opinion Letter dealing with the practice of assessing obstetrical services in periodic installments, the Board stated that "[a]s long as there are no finance charges assessed, *and at no point do the charges for the services rendered exceed the payments to the extent that it would require more than 4 of the periodic instalments to repay the obligation,* then the plan would not fall within the provisions of Regulation Z." [3] (Emphasis supplied.) This statement implicitly recognizes that credit is extended only when the value of goods or services provided exceeds the payments made.[4]

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[3] FRB Opinion Letter No. 262 (1970); 4 CCH Consumer Credit Guide ¶ 30,516.

II

Implicit in the positions both of MR. JUSTICE DOUGLAS and of the majority is the assumption that, even admitting petitioner was to pay for each magazine before receiving it, under some factual circumstances respondent might nevertheless have extended credit.[5] Thus, MR. JUSTICE DOUGLAS states that "if respondent advanced all or part of the subscription price to the publishers, respondent would be advancing 'credit' for the benefit of the customer." The majority is less clear on this point, stating only that "[i]n some cases in which a consumer pays in installments for a magazine subscription, credit may not have been extended to the consumer." *Ante,* at 362 n. 16. The implication, however, is that in some such transactions, though the consumer pays for the magazines in advance, he may be the recipient of credit. I am unable to agree that under any set of circumstances, given the undisputed fact that petitioner agreed to pay in advance for each magazine, respondent might have extended credit. Petitioner did not obtain a loan from respondent which she would be unconditionally obligated to repay. She entered into a contract imposing continuing, mutually dependent obligations on both parties.[6]

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[4] Legislative history bolsters the view that Congress assumed "credit" meant the receipt of goods or services in advance of paying for them. In earlier versions of the Act, the definition of credit included "any contract . . . of sale of property or services, either for present or future delivery, under which part or all of the price is payable subsequent to the making of such sale or contract; . . . any contract or arrangement for the hire, bailment, or leasing of property . . . ." S. 1740, 87th Cong., 1st Sess.; S. 5, 90th Cong., 1st Sess. (as introduced Jan. 11, 1967). During the Senate hearings, a question was raised as to whether any finance charge would be attributable to certain included transactions, particularly ordinary bailment and lease arrangements. Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 663 (1967) (statement of J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System). This criticism was heeded and the final version of the bill substituted the language now found in the Act (15 U. S. C. § 1602 (e)) with the following explanation: "The original S. 5 language was deleted because it was somewhat cumbersome and sweeping and referred to various types of lease situations which might not be true extensions of credit." S. Rep. No. 392, 90th Cong., 1st Sess., 12 (1967). In fact a lease, like the "paid during service" magazine contracts offered by respondent, often imposes a noncancellable obligation on the lessee or consumer to pay in a series of installments. Yet the lessor does not extend credit because the lessee ordinarily pays in advance for each period during which he enjoys the use of the property. Petitioner, by the same reasoning, was no more the recipient of credit than is the ordinary lessee or bailee. It would be inconsistent with this legislative history to read "extension of credit" to include every noncancellable installment obligation.

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[5] The District Court found that there was no issue as to any material fact in this case. The Court of Appeals did not disturb this finding. Whether one agrees with this finding as does the majority or disagrees for reasons stated by MR. JUSTICE DOUGLAS, the District Court's conclusion that the uncontroverted facts establish a consumer credit transaction is clearly a conclusion of law and therefore is entitled to no presumption of correctness. Nor do respondent's dunning letters to petitioner describing her obligation as a credit account create any such presumption. Again, such statements only express a legal conclusion and do not establish the existence of a consumer credit transaction within the meaning of the Act.

[6] If respondent failed to deliver the magazines as agreed prior to completion of the specified payments, petitioner would have no further obligation to pay:

"A contract for the sale of goods may be an instalment contract with respect to the goods sold as with respect to payments of the price. The non-delivery of an instalment or delivery of a nonconforming instalment when required by the contract is a breach for which an action can be maintained at once. There is no doubt also

Whether respondent advanced any part of the subscription price to magazine publishers is quite immaterial to a determination of the legal effect of the only transaction involved in this case: whether there was extension of consumer credit by *respondent* to *petitioner*. The only contract at issue is that between the parties; how and upon what terms respondent may have arranged to obtain the magazines for delivery to petitioner in fulfillment of its contractual obligations is of no concern to petitioner. Nor can any such arrangement by respondent with a third party change the nature of the transaction between the parties to this litigation.[7]

The controlling facts therefore are not in dispute, having been admitted by the cross-motions for summary judgment, and I can perceive of no way in which they can be construed as an extension of consumer credit by respondent to petitioner. A remand, unnecessarily burdening the parties and the court below, would serve no useful purpose. As a matter of law respondent did not extend credit within the meaning of the Truth in Lending Act. I would affirm the judgment below.

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that the buyer is privileged to withhold payment of the price of the undelivered instalment or of a nonconforming instalment that is rightfully rejected. . . . [T]he buyer does not have to extend such credit [beyond that which was agreed upon] to the seller by making payments without receiving the agreed goods." 3A A. Corbin, Contracts § 691, p. 264 (1960). See Fla. Stat. Ann. §§ 672.2-612, 672.2-711, 672.2-717 (1966).

[7] Indeed, petitioner's complaint avers that the installment contract for the purchase and sale of the magazines is "the only instrument executed and existing between the parties," and that respondent thereby "extend[ed] Consumer Credit as defined in Regulation Z . . . ." There is no allegation as to extension of credit by the publishers or by any third person. Second Amended Complaint, App. 3, 4.

PALMORE *v.* UNITED STATES

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 72-11. Argued February 21, 1973—Decided April 24, 1973

Palmore was convicted of a felony in violation of the District of Columbia Code by the Superior Court of the District of Columbia. The District of Columbia Court of Appeals, rejecting Palmore's contention that he was entitled to be tried by an Art. III judge with lifetime tenure and salary protection, affirmed, concluding that under the plenary power to legislate for the District of Columbia conferred by Art. I, § 8, cl. 17, of the Constitution, Congress had "constitutional power to proscribe certain criminal conduct only in the District and to select the appropriate court, whether it is created by virtue of article III or article I, to hear and determine . . . particular criminal cases within the District." Palmore seeks to invoke this Court's appellate jurisdiction on the basis of 28 U. S. C. § 1257 (2), which provides for an appeal to this Court from a final judgment upholding the validity of "a statute of any state" against a claim that it is repugnant to the Constitution. *Held:*

1. The District of Columbia Code is not a state statute for purposes of § 1257 (2), and the lower court's upholding of the federal statute is therefore not reviewable by appeal but by certiorari. Pp. 394-397.

2. Not every judicial proceeding that implicates a charge, claim, or defense based on an Act of Congress or a law made under its authority must be presided over by an Art. III judge. Pp. 397-410.

(a) The jurisdictional grant respecting "such inferior Courts as the Congress may from time to time ordain and establish" requires neither that only Art. III courts hear and decide cases within the judicial power of the United States nor that each inferior court be invested with all the jurisdiction flowing from Art. III, and federal criminal laws have been enforced by state, territorial, and military courts and judges who did not enjoy the Art. III protections. Pp. 397-404.

(b) The strictly local court system consisting of the Superior Court and the Court of Appeals for the District of Columbia was created by the District of Columbia Court Reform and Criminal Procedure Act of 1970 pursuant to Congress' plenary Art. I power to legislate for the District of Columbia, and was intended to relieve the Art. III courts of the burdens of local civil and criminal litigation. *O'Donoghue* v. *United States,* 289 U. S. 516, distinguished. Pp. 405-407.

Appeal dismissed and certiorari granted in part; 290 A. 2d 573, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 410.

Frank F. Flegal argued the cause and filed briefs for appellant.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Petersen, Deputy Solicitor General Lacovara, Keith A. Jones, Roger A. Pauley,* and *Marshall Tamor Golding.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Aside from an initial question of our appellate jurisdiction under 28 U. S. C. § 1257 (2), this case requires us to decide whether a defendant charged with a felony under the District of Columbia Code may be tried by a judge who does not have protection with respect to tenure and salary under Art. III of the Constitution. We hold that under its Art. I, § 8, cl. 17, power to legislate for the District of Columbia, Congress may provide for trying local criminal cases before judges who, in accordance with the District of Columbia Code, are not accorded life tenure and protection against reduction in salary. In this respect, the position of the District of Columbia defendant is similar to that of the citizen of any of the 50 States when charged with violation of a state criminal law: Neither has a federal constitutional right to be tried before judges with tenure and salary guarantees.

I

The facts are uncomplicated. In January 1971, two officers of the District of Columbia Metropolitan Police Department observed a moving automobile with license tags suggesting that it was a rented vehicle. Although no traffic or other violation was then indicated, the officer stopped the vehicle for a spot-check of the driver's license and car-rental agreement. Palmore, the driver of the vehicle, produced a rental agreement from the glove compartment of the car and explained why the car appeared to be, but was not, overdue. During this time, one of the officers observed the hammer mechanism of a gun protruding from under the armrest in the front seat of the vehicle. Palmore was arrested and later charged with the felony of carrying an unregistered pistol in the District of Columbia after having been convicted of a felony, in violation of the District of Columbia Code, § 22–3204 (1967).[1] He was tried and found guilty in the Superior Court of the District of Columbia.

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[1] The section provided:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22–3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

Under Title I of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (Reorganization Act),[2] the judges of the Superior

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[2] Before passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, the local court system consisted of one appellate court and three trial courts, two of which, the juvenile court and the tax court, were courts of special jurisdiction. The third trial court, the District of Columbia Court of General Sessions, was one of quite limited jurisdiction, its criminal jurisdiction consisting solely of that exercised concurrently with the United States District Court over misdemeanors and petty offenses, D. C. Code Ann. § 11-963 (1967). The court's civil jurisdiction was restricted to cases where the amount in controversy did not exceed $10,000, and it had jurisdiction over cases involving title to real property only as part of a divorce action. *Id.*, §§ 11-961 and 11-1141. The judgments of the appellate court, the District of Columbia Court of Appeals, were subject to review by the United States Court of Appeals for the District of Columbia Circuit. *Id.*, § 11-321.

The United States District Court for the District had concurrent jurisdiction with the Court of General Sessions over most of the criminal and civil matters handled by that court, *id.*, §§ 11-521, 11-522, and 11-523, and had exclusive jurisdiction over felony offenses, even though committed in violation of locally applicable laws, *id.*, § 11-521. Thus, the District Court was filling the role of both a local and federal court.

Seeking to improve the performance of the court system, Congress, in Title I of the Reorganization Act, invested the local courts with jurisdiction equivalent to that exercised by state courts. S. Rep. No. 91-405, pp. 2-3; H. R. Rep. No. 91-907, pp. 23-24. The three former trial courts were combined into the new Superior Court of the District of Columbia, D. C. Code Ann. § 11-901 (Supp. V, 1972), which was vested, with a minor exception, *id.*, § 11-502 (3), with exclusive jurisdiction over all criminal cases, including felonies, brought under laws applicable exclusively to the District, *id.*, § 11-923 (b). Its civil jurisdiction reached all civil actions and any other matter at law or in equity, brought in the District of Columbia, except those in which exclusive jurisdiction was vested in the United States District Court. *Id.*, § 11-921. The local appeals court, the District of Columbia Court of Appeals, would ultimately not be subject to review by the United States Court of

Court are appointed by the President and serve for terms of 15 years. D. C. Code Ann. §§ 11-1501 (a), 11-1502 (Supp. V, 1972).[3] Palmore moved to dismiss the indictment against him, urging that only a court "ordain[ed] and establish[ed]" in accordance with Art. III of the United States Constitution could constitutionally try him for a felony prosecution under the District of Columbia Code. He also moved to suppress the pistol as the fruit of an illegal search and seizure. The motions were denied in the Superior Court, and Palmore was convicted.

The District of Columbia Court of Appeals affirmed, concluding that under the plenary power to legislate for the District of Columbia, conferred by Art. I, § 8, cl. 17, of the Constitution, Congress had "constitutional power to proscribe certain criminal conduct only in the District and to select the appropriate court, whether it is created by virtue of article III or article I, to hear and determine these particular criminal cases within the District." 290 A. 2d 573, 576-577 (1972). Palmore filed a notice of appeal with the District of

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Appeals, *id.*, § 11-301, and was declared to be the "highest court of the District of Columbia" for purposes of further review by this Court. *Id.*, § 11-102.

In addition to the shift in jurisdiction, the number of local judges was increased, their tenure was lengthened from 10 to 15 years, and their salaries were increased and fixed at a percentage of that of judges of the United States courts. *Id.*, §§ 11-702, 11-703, 11-903, 11-904, and 11-1502; D. C. Code Ann. §§ 11-702, 11-902, 11-1502, 47-2402 (1967). The Reorganization Act established a Commission on Judicial Disabilities and Tenure to deal with suspension, retirement, or removal of local judges, D. C. Code Ann. § 11-1521 *et seq.* (Supp. V, 1972). It also provided for improved administration of the local courts, *id.*, § 11-1701 *et seq.*, including authorization for an Executive Officer responsible for the administration of the local court system. *Id.*, § 11-1703.

[3] The 15-year term is subject to the provision for mandatory retirement at age 70. D. C. Code Ann. § 11-1502. (Supp. V, 1972).

Columbia Court of Appeals and his jurisdictional statement here, purporting to perfect an appeal under 28 U. S. C. § 1257 (2). We postponed further consideration of our jurisdiction to review this case by way of appeal to the hearing on the merits. 409 U. S. 840 (1972).

II

Title 28 U. S. C. § 1257[4] specifies the circumstances under which the final judgments of the highest court of a State may be reviewed in this Court by way of appeal or writ of certiorari. As amended in 1970 by § 172 (a)(1) of the Reorganization Act, 84 Stat. 590, the term "highest court of a State" as used in § 1257 includes the District of Columbia Court of Appeals. Appeal lies from such courts only where a statute of the United States is struck down, 28 U. S. C. § 1257 (1), or where a statute of a State is sustained against federal constitutional attack, *id.*, § 1257 (2). Because the statute at issue was upheld in this case, an appeal to this Court from that judgment lies only if the statute was a "statute of any state" within the meaning of § 1257 (2). Palmore insists that it is, but we cannot agree.

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[4] Title 28 U. S. C. § 1257 provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

The 1970 amendment to § 1257 plainly provided that the District of Columbia Court of Appeals should be treated as the "highest court of a State," but nowhere in § 1257, or elsewhere, has Congress provided that the words "statute of any state," as used in § 1257 (2), are to include the provisions of the District of Columbia Code. A reference to "state statutes" would ordinarily not include provisions of the District of Columbia Code, which was enacted, not by a state legislature, but by Congress, and which applies only within the boundaries of the District of Columbia. The District of Columbia is constitutionally distinct from the States, *Hepburn* v. *Ellzey,* 2 Cranch 445 (1805); cf. *National Mutual Ins. Co.* v. *Tidewater Transfer Co.,* 337 U. S. 582 (1949). Nor does it follow from the decision to treat the District of Columbia Court of Appeals as a state court that the District Code was to be considered a state statute for the purposes of § 1257. We are entitled to assume that in amending § 1257, Congress legislated with care, and that had Congress intended to equate the District Code and state statutes for the purposes of § 1257, it would have said so expressly, and not left the matter to mere implication.[5]

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[5] An express provision "would have been easy," *Farnsworth* v. *Montana,* 129 U. S. 104, 113 (1889), as demonstrated by specific provisions in the United States Code concerning the District of Columbia. Cf. 28 U. S. C. § 1363, added to the United States Code by § 172 (c)(1) of the Reorganization Act, 84 Stat. 590, where for purposes of c. 85 dealing with the jurisdiction of the United States District Courts, it is provided that "references to laws of the United States or Acts of Congress do not

Jurisdictional statutes are to be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes," *Cheng Fan Kwok* v. *INS*, 392 U. S. 206, 212 (1968); and we are particularly prone to accord "strict construction of statutes authorizing appeals" to this Court. *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 42 n. 1 (1970). We will not, therefore, hold that Congress intended to treat the District of Columbia Code as a state statute for the purposes of § 1257 (2). Cf. *Farnsworth* v. *Montana*, 129 U. S. 104, 112–114 (1889).

Palmore relies on *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922), where an enactment of the territorial legislature of Puerto Rico was held to be a statute of a State within the meaning of the then-applicable statutory provisions governing appeals to this Court. That result has been codified in 28 U. S. C. § 1258; but, even so, the *Balzac* rationale was severely undermined in *Fornaris*, where we held that a statute passed by the legislature of Puerto Rico is not "a State statute" within the meaning of 28 U. S. C. § 1254 (2), and that it should not be treated as such in the absence of more definitive guidance from Congress.

We conclude that we do not have jurisdiction of the appeal filed in this case. Palmore presents federal constitutional issues, however, that are reviewable by writ of certiorari under § 1257 (3); and treating the jurisdictional statement as a petition for writ of certiorari, cf. 28 U. S. C. § 2103, we grant the petition limited to the question of whether Palmore was entitled to be tried by

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include laws applicable exclusively to the District of Columbia." See also the treatment of the District of Columbia as a "State" for purposes of diversity jurisdiction, 28 U. S. C. § 1332 (d), and the equally discrete provision of 28 U. S. C. § 1451, added to the Code by § 172 (d)(1) of the Reorganization Act, 84 Stat. 591, which provides that for purposes of the removal provisions, the Superior Court of the District of Columbia is to be considered a "State court"; and the District of Columbia is deemed to be a "State."

a court ordained and established in accordance with Art. III, § 1, of the Constitution.[6] It is to this issue that we now turn.

III

Art. I, § 8, cl. 17, of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. The power is plenary. Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress "may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States." *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 5 (1899). This has been the characteristic view in this Court of congressional powers with respect to the District.[7] It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8. See *Gibbons* v. *District of Columbia,* 116 U. S. 404, 408 (1886).

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[6] Because we postponed the question of our jurisdiction over this appeal to consideration of the merits, rather than entering an unrestricted notation of probable jurisdiction, there is no basis for inferring, from our finding this appeal improper, that our initial order must nevertheless be taken as having granted certiorari on any of the issues presented. Hence, our denial of the writ with respect to the Fourth Amendment claim, rather than a dismissal, is proper. Cf. *Mishkin* v. *New York,* 383 U. S. 502, 512–513 (1966).

[7] *Kendall* v. *United States,* 12 Pet. 524, 619 (1838); *Mattingly* v. *District of Columbia,* 97 U. S. 687, 690 (1878); *Gibbons* v. *District of Columbia,* 116 U. S. 404, 407 (1886); *Shoemaker* v. *United States,* 147 U. S. 282, 300 (1893); *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 435 (1932); *O'Donoghue* v. *United States,* 289 U. S. 516, 545 (1933).

Pursuant to its Clause 17 authority, Congress has from time to time enacted laws that compose the District of Columbia Code. The 1970 Reorganization Act amended the Code by creating the Superior Court of the District of Columbia and the District of Columbia Court of Appeals, the courts being expressly "established pursuant to article I of the Constitution." D. C. Code Ann. § 11-101 (2) (Supp. V, 1972). See n. 2, *supra.* The Superior Court, among other things, was vested with jurisdiction to hear criminal cases involving alleged violations of the criminal laws applicable only to the District of Columbia, *id.,* § 11-923; the District of Columbia Court of Appeals, with jurisdiction to hear appeals in such cases. *Id.,* § 11-721. At the same time, Congress exercised its powers under Art. I, § 8, cl. 9, and Art. III to redefine the jurisdiction of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. *Id.,* §§ 11-301, 11-501, and 11-502. As the Committee on the District of Columbia said, H. R. Rep. No. 91-907, p. 44:

> "This title makes clear (section 11-101) that the District of Columbia Courts (the District of Columbia Court of Appeals, and the Superior Court of the District of Columbia) are Article I courts, created pursuant to Article I, section 8, clause 17 of the United States Constitution, and not Article III courts. The authority under which the local courts are established has not been statutorily provided in prior law; the Supreme Court of the United States

> has not declared the local system to be either Article I or Article III courts, decisions having indicated that the District of Columbia courts are, in this respect, both fish and fowl. This expression of the intent of the Congress clarifies the status of the local courts."

It was under the judicial power conferred on the Superior Court by the 1970 Reorganization Act that Palmore was convicted of violation of § 22–3204 of the District of Columbia Code (1967). The conviction was clearly within the authority granted Congress by Art. I, § 8, cl. 17, unless, as Palmore contends, Art. III of the Constitution requires that prosecutions for District of Columbia felonies must be presided over by a judge having the tenure and salary protections provided by Art. III.[8]

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[8] Sections 1 and 2 of Art. III state:

"SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

"SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, Palmore's argument is straightforward: Art. III vests the "judicial Power" of the United States in courts with judges holding office during good behavior and whose salary cannot be diminished; the "judicial Power" that these courts are to exercise "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."; the District of Columbia Code, having been enacted by Congress, is a law of the United States; this prosecution for violation of § 22-3204 of the Code is therefore a case arising under the laws of the United States, involves an exercise of the "judicial Power" of the United States, and must therefore be tried by an Art. III judge.

This position ultimately rests on the proposition that an Art. III judge must preside over every proceeding in which a charge, claim, or defense is based on an Act of Congress or a law made under its authority. At the very least, it asserts that criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Art. III. In our view, however, there is no support for this view in either constitutional text or in constitutional history and practice.

Article III describes the judicial power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested "in such inferior Courts as the Congress may from time to time ordain and establish." The decision with

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both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III. "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Cary* v. *Curtis,* 3 How. 236, 245 (1845).[9] Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.

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[9] This was the view of the Court prior to *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (1816). *Turner* v. *Bank of North America,* 4 Dall. 8 (1799); *United States* v. *Hudson,* 7 Cranch 32 (1812). And the contrary statements in *Hunter's Lessee, supra,* at 327–339, did not survive later cases. See for example, in addition to *Cary* v. *Curtis,* 3 How. 236 (1845), quoted in the text, *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 721–722 (1838); *Sheldon* v. *Sill,* 8 How. 441 (1850); *Case of the Sewing Machine Companies,* 18 Wall. 553, 577–578 (1874); *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 233–234 (1922).

It was neither the legislative nor judicial view, therefore, that trial and decision of all federal questions were reserved for Art. III judges. Nor, more particularly, has the enforcement of federal criminal law been deemed the exclusive province of federal Art. III courts. Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III. See Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 551–553, 570–572 (1925); F. Frankfurter & J. Landis, The Business of the Supreme Court 293 (1927); Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism, 60 Harv. L. Rev. 966 (1947). More recently, this Court unanimously held that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws; the fact "that Rhode Island has an established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a 'valid excuse.'" *Testa* v. *Katt,* 330 U. S. 386, 392 (1947). Although recognizing the contrary sentiments expressed in *Prigg* v. *Pennsylvania,* 16 Pet. 539, 615–616 (1842), and other cases, the sense of the *Testa* opinion was that it merely reflected longstanding constitutional decision and policy represented by such cases as *Claflin* v. *Houseman,* 93 U. S. 130 (1876), and *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1 (1912).

It is also true that throughout our history, Congress has exercised its power under Art. IV to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" by creating territorial courts and manning them with judges appointed for a term of years. These courts have not been deemed subject to the strictures of Art. III, even though they characteristically enforced not only the civil and criminal laws of Congress applicable throughout the United States, but also the laws applicable only within the boundaries of the particular territory. Speaking for a unanimous Court in *American Ins. Co.* v. *Canter,* 1 Pet. 511 (1828), Mr. Chief Justice Marshall held that the territorial courts of Florida, although not Art. III courts, could hear and determine cases governed by the admiralty and maritime law that ordinarily could be heard only by Art. III judges. "[T]he same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government." *Id.,* at 546. This has been the consistent view of this Court.[10] Territorial courts, therefore, have regularly tried criminal cases arising under the general laws of Congress,[11] as well as those brought under territorial laws.[12]

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[10] *Clinton* v. *Englebrecht,* 13 Wall. 434, 447 (1872); *Hornbuckle* v. *Toombs,* 18 Wall. 648, 655–656 (1874); *Reynolds* v. *United States,* 98 U. S. 145, 154 (1879); *The City of Panama,* 101 U. S. 453, 460 (1880); *McAllister* v. *United States,* 141 U. S. 174, 180–184 (1891); *United States* v. *McMillan,* 165 U. S. 504, 510 (1897); *Romeu* v. *Todd,* 206 U. S. 358, 369 (1907); *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 544–548 (1962).

[11] See, *e. g., Baker* v. *United States,* 1 Wis. 641 (1846); *United States* v. *Tom,* 1 Ore. 26 (1853); *Franklin* v. *United States,* 1 Colo. 35 (1867); *Pickett* v. *United States,* 1 Idaho 523 (1874); *United States* v. *Reynolds,* 1 Utah 226 (1875); *Fisher* v. *United States,* 1 Okla. 252, 31 P. 195 (1892).

[12] See, *e. g., Territory of Oregon* v. *Coleman,* 1 Ore. 191 (1855); *Gile* v. *People,* 1 Colo. 60 (1867); *People* v. *Waters,* 1 Idaho 560 (1874); *People* v. *Shafer,* 1 Utah 260 (1875); *Ex parte Larkin,* 1 Okla. 53, 25 P. 745 (1891).

There is another context in which criminal cases arising under federal statutes are tried, and defendants convicted, in non-Art. III courts. Under its Art. I, § 8, cl. 14, power "[t]o make Rules for the Government and Regulation of the land and naval Forces," Congress has declared certain behavior by members of the Armed Forces to be criminal and provided for the trial of such cases by court-martial proceedings in the military mode, not by courts ordained and established under Art. III. Within their proper sphere, courts-martial are constitutional instruments to carry out congressional and executive will. *Dynes* v. *Hoover,* 20 How. 65, 79, 82 (1857). The "exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply," *O'Callahan* v. *Parker,* 395 U. S. 258, 261 (1969); and "the Constitution does not provide life tenure for those performing judicial functions in military trials," *Toth* v. *Quarles,* 350 U. S. 11, 17 (1955).

"The same confluence of practical considerations that dictated the result in [*American Ins. Co.* v. *Canter, supra*], has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure," *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 547 (1962), such as the Court of Private Land Claims, *United States* v. *Coe,* 155 U. S. 76, 85–86 (1894); the Choctaw and Chickasaw Citizenship Court, *Stephens* v. *Cherokee Nation,* 174 U. S. 445 (1899); *Ex parte Joins,* 191 U. S. 93 (1903); *Wallace* v. *Adams,* 204 U. S. 415 (1907); courts created in unincorporated districts outside the mainland, *Downes* v. *Bidwell,* 182 U. S. 244, 266–267 (1901); *Balzac* v. *Porto Rico,* 258 U. S., at 312–313, and the Consular Courts established by concessions from foreign countries, *In re Ross,* 140 U. S. 453, 464–465, 480 (1891).

IV

Whatever may be true in other instances, however, it is strongly argued that *O'Donoghue* v. *United States,* 289 U. S. 516 (1933), constrains us to hold that all of the courts of the District of Columbia must be deemed Art. III courts and that the judges presiding over them must be appointed to serve during their good behavior in accordance with the requirements of Art. III. *O'Donoghue* involved the question whether the judges of the District of Columbia's Supreme Court and Court of Appeals were constitutionally protected from having their salaries reduced by an Act of Congress. This Court, over three dissents and contrary to extensive prior dicta, see *Ex parte Bakelite Corp.,* 279 U. S. 438, 450 (1929); *Butterworth* v. *Hoe,* 112 U. S. 50 (1884); *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428 (1923); *Federal Radio Comm'n* v. *General Electric Co.,* 281 U. S. 464 (1930), held that the two courts under consideration were constitutional courts exercising the judicial power of the United States and that the judges in question were not subject to the salary reduction legislation as they would have been had they been judges of legislative courts.

We cannot agree that *O'Donoghue* governs this case.[13] The District of Columbia courts there involved, the

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[13] We should note here that in *Glidden Co.* v. *Zdanok, supra,* it was urged that Art. III forbade the assignment of a judge of the Court of Customs and Patent Appeals to try a criminal case arising under the District of Columbia Code. The Court of Appeals ruled that even if the judge in question was not an Art. III judge, Art. I, § 8, cl. 17, was sufficient authority for his assignment to try cases in the District. The United States there urged that this was true at least with respect to laws arising under the District of Columbia Code rather than under a law of national application. Mr. Justice Harlan, for himself and Justices BRENNAN and STEWART, found it unnecessary to reach this question, but considered it an open one, for he expressly reserved "intimating any view

Supreme Court and the Court of Appeals, had authority not only in the District, but also over all those controversies, civil and criminal, arising under the Constitution and the statutes of the United States and having nationwide application. These courts, as this Court noted in its opinion, were "of equal rank and power with those of other inferior courts of the federal system . . . ." *O'Donoghue, supra,* at 534. Relying heavily on congressional intent, the Court considered that Congress, by consistently providing the judges of these courts with lifetime tenure, had indicated a "congressional practice from the beginning [which] recognize[d] a complete parallelism between the courts of the District [of Columbia] and the district and circuit courts of appeals of the United States." *Id.,* at 549. Moreover, these courts, constituted as they were, and being closer to the legislative department, "exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments," *id.,* at 535, and were the only courts within the District in which District inhabitants could exercise their "right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III." *Id.,* at 540.

The case before us is a far cry from *O'Donoghue.* Here Congress has expressly created two systems of courts in the District. One of them is made up of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Co-

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as to the correctness of the holding below . . . ." 370 U. S., at 538. Apparently, for him, *O'Donoghue* had not foreclosed the issue with respect to the trial of the criminal case under the District of Columbia Code. Mr. Justice Clark, for himself and the Chief Justice, also thought the question open. See *id.,* at 589 n. 4.

lumbia Circuit, which are constitutional courts manned by Art. III judges to which the citizens of the District must or may resort for consideration of those constitutional and statutory matters of general concern which so moved the Court in *O'Donoghue*. The other system is made up of strictly local courts, the Superior Court and the District of Columbia Court of Appeals. These courts were expressly created pursuant to the plenary Art. I power to legislate for the District of Columbia, D. C. Code Ann. § 11-101 (2) (Supp. V, 1972), and to exercise the "powers of . . . a State government in all cases where legislation is possible." *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 147 (1889).

The *O'Donoghue* Court had before it District of Columbia courts in which the consideration of "purely local affairs [was] obviously subordinate and incidental." *O'Donoghue, supra,* at 539. Here, on the other hand, we have courts the focus of whose work is primarily upon cases arising under the District of Columbia Code and to other matters of strictly local concern. They handle criminal cases only under statutes that are applicable to the District of Columbia alone. *O'Donoghue* did not concern itself with courts like these, and it is not controlling here.

V

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. Here, Congress reorganized the court system in the District of Columbia and established one set of courts in the District with Art. III characteristics and devoted to matters of national concern. It also created a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area.

From its own studies, Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable, and that neither those matters of national concern nor those of strictly local cognizance were being promptly tried and disposed of by the existing court system. See, *e. g.*, 115 Cong. Rec. 25538 (1969); 116 Cong. Rec. 8091-8092 (1970).[14] The remedy in part, was to relieve the regular Art. III courts, that is, the United States District Court for the District of Columbia and the United States

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[14] The Senate Committee noted that notwithstanding the visiting judge program, "an unsurpassed number of days on the bench per district court judge," and as many as 12 out of the 14 District Court judges being "assigned full time to the trial of local felony offenses," the backlog of criminal cases in the United States District Court numbered 1,669, and the median time lapse from filing to final disposition in felony trials in that court was more than triple that in other district courts. Additionally, the median time for civil jury trial in the District Court was nearly double that in other district courts. Though there had been an increase in the number of felonies committed in the District of Columbia, there was a concomitant decrease in the number of felonies prosecuted. S. Rep. No. 91-405, *supra,* at 2-3.

Court of Appeals for the District of Columbia Circuit, from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress. The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction. S. Rep. No. 91–405, pp. 1–3, 5, 18; H. R. Rep. No. 91–907, pp. 23–24, 33.

Furthermore, Congress, after careful consideration, determined that it preferred, and had the power to utilize, a local court system staffed by judges without lifetime tenure. S. Rep. No. 91–405, *supra,* at 17–18; H. R. Rep. No. 91–907, *supra,* at 44. Congress made a deliberate choice to create judgeships with terms of 15 years, D. C. Code Ann. § 11–1502 (Supp. V, 1972), and to subject judges in those positions to removal or suspension by a judicial commission under certain established circumstances. *Id.,* §§ 11–1502, 11–1521 *et seq.* It was thought that such a system would be more workable and efficient in administering and discharging the work of a multifaceted metropolitan court system. See S. Rep. No. 91–405, *supra,* at 8–11; H. R. Rep. No. 91–907, *supra,* at 35–39.

In providing for fixed terms of office, Congress was cognizant of the fact that "virtually no State has provided" for tenure during good behavior, S. Rep. No. 91–405, *supra,* at 8, see H. R. Rep. No. 91–907, *supra,* at 38, the District of Columbia Court of Appeals noting that 46 of the 50 States have not provided life tenure for trial judges who hear felony cases, 290 A. 2d, at 578 n. 12; and the provisions of the Act, with respect to court administration and to judicial removal and suspension, were considered by some as a model for the States. 115 Cong. Rec. 25538 (1969). See Hearings on H. R. 13689 and 12854 before Subcommittee No. 1 of the House Committee on the District of Columbia, 91st Cong., 1st Sess., pt. 1, pp. 69, 71 (1969).

We do not discount the importance attached to the tenure and salary provisions of Art. III, but we conclude that Congress was not required to provide an Art. III court for the trial of criminal cases arising under its laws applicable only within the District of Columbia. Palmore's trial in the Superior Court was authorized by Congress' Art. I power to legislate for the District in all cases whatsoever. Palmore was no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local crime. Nor did his trial by a nontenured judge deprive him of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to tenure deprives them of due process of law under the Fourteenth Amendment.

The judgment of the District of Columbia Court of Appeals is affirmed.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

Appellant, indicted for carrying a dangerous weapon in violation of D. C. Code Ann. § 22-3204, was tried and convicted in the Superior Court of the District of Columbia, an Art. I court created by Congress[1] under the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473. His timely objection is that he was tried, convicted, and sentenced by a court not established under Art. III.

The judges of the court that convicted him

—hold office for a term of fifteen years,[2] not for life as do Art. III judges;

—unlike Art. III judges,[3] their salaries are not protected from diminishment during their continuance in office;

—unlike Art. III judges, they can be removed from office by a five-member Commission[4] through

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[1] D. C. Code Ann. § 11–101 (Supp. V, 1972) provides, "The judicial power in the District of Columbia is vested in . . . (2) The following District of Columbia courts established pursuant to article I of the Constitution: (A) The District of Columbia Court of Appeals. (B) The Superior Court of the District of Columbia."

[2] D. C. Code Ann. § 11–1502 (Supp. V, 1972).

[3] By Art. III, § 1, federal judges "hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

[4] A Commission on Judicial Disabilities and Tenure is established with the power "to suspend, retire, or remove" one of these judges. D. C. Code Ann. § 11–1521 (Supp. V, 1972). The President names three members, the Commissioner of the District names one, and the Chief Judge of the District Court names the fifth. There are three alternate members. The President names the Chairman. *Id.*, § 11–1522. All members are appointed for a term of six years. *Id.*, § 11–1523. A judge must be removed if he has committed a felony and been finally convicted. *Id.*, § 11–1526 (a)(1). He shall be removed if the Commission finds

"(A) willful misconduct in office,

"(B) willful and persistent failure to perform judicial duties, or

"(C) any other conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute." *Ibid.*

He shall be involuntarily retired if "(1) the Commission deter-

> less formidable means of procedure than impeachment. While two of the five members must be lawyers (one a member of the District Bar in active practice for at least five of the ten years prior to his appointment and one an active or retired federal judge serving in the District) the other three may be laymen. One of the three must be a layman. D. C. Code Ann. § 11-1522 (Supp. V, 1972).

In other words, these Superior Court judges are not members of the independent judiciary which has been one of our proudest boasts, by reason of Art. III. The safeguards accorded Art. III judges were designed to protect litigants with unpopular or minority causes or litigants who belong to despised or suspect classes. The safeguards surround the judge and give him a measure of protection against the hostile press, the leftist or rightist demands of the party in power, the glowering looks of those in the top echelon in whose hands rest the power of reappointment.

In the Constitutional Convention of 1787 it was proposed that judges "may be removed by the Executive on the application by the Senate and House of Represent-

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mines that the judge suffers from a mental or physical disability (including habitual intemperance) which is or is likely to become permanent and which prevents, or seriously interferes with, the proper performance of his judicial duties, and (2) the Commission files in the District of Columbia Court of Appeals an order of involuntary retirement and the order is affirmed on appeal or the time within which an appeal may be taken from the order has expired." *Id.,* § 11-1526 (b).

The Act also contains elaborate provisions for the suspension of the judge without salary, or with retirement salary, or with salary dependent on the circumstances described in §§ 11-1526 (c)(1), (2), and (3). The Act contains the procedure which the Commission must follow and the notice and hearing to which the judge is entitled. *Id.,* § 11-1527.

atives." The proposal was defeated, only Connecticut voting for it. Wilson apparently expressed the common sentiment: "The Judges would be in a bad situation if made to depend on any gust of faction which might prevail in the two branches of our Government." [5]

Without the independence granted and enjoyed by Art. III judges, a federal judge could more easily become the tool of a ravenous Executive Branch. This idea was reflected in Reports by Congress in 1965 and 1966,[6] sponsoring a law that would give lifetime tenure to federal judges in Puerto Rico. The House Report stated: [7]

> ". . . Federal litigants in Puerto Rico should not be denied the benefit of judges made independent by life tenure from the pressures of those who might influence his chances of reappointment, which benefits the Constitution guarantees to the litigants in all other Federal courts."

Art. I, § 8, cl. 17, of the Constitution provides: "The Congress shall have Power . . . To exercise exclusive Legislation . . . over such District . . . as may . . . become the Seat of the Government of the United States . . . ." This legislative power is plenary, giving Congress authority to establish the method by which the District of Columbia will be governed, and to alter from time to time the form of that government. *District of Columbia* v. *Thompson Co.,* 346 U. S. 100, 104-110.

Legislative courts may be given executive and administrative duties, the examples being well known. But if they are given "judicial Power," as are the judges of the present Superior Court of the District, those trials have guarantees that are prescribed by the Constitution and Bill of Rights. First, as to jury trial, Art. III says: "The Trial of all Crimes . . . shall be by Jury." But trial by jury is also guaranteed by the Sixth Amendment in all criminal prosecutions. Even Mr. Justice McReynolds and Mr. Justice Butler, not known as libertarians, thought "all" meant "all," not permitting the exclusions of so-called "petty" offenses. *District of Columbia* v. *Clawans,* 300 U. S. 617, 633. Congress may not deprive an accused of that protection in a District of Columbia trial. *District of Columbia* v. *Colts,* 282 U. S. 63, 74; *Callan* v. *Wilson,* 127 U. S. 540.

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[5] Madison, 2 Journal of the Federal Convention 257 (G. Hunt ed. 1908).

[6] H. R. Rep. No. 135, 89th Cong., 1st Sess.; S. Rep. No. 1504, 89th Cong., 2d Sess.

[7] H. R. Rep. No. 135, *supra,* n. 6, at 2.

The Fifth Amendment provides for the right to indictment; and Congress may not dispense with that right for a local criminal offense in the District of Columbia. *United States* v. *Moreland,* 258 U. S. 433.

The Sixth Amendment's guarantee extends to speedy and public trials, the right of confrontation, compulsory process and the assistance of counsel "[i]n all criminal prosecutions."

The Fifth Amendment guarantees one against double jeopardy and gives the privilege against self-incrimination "in any criminal case," and guarantees that no one shall "be deprived of life, liberty, or property, without due process of law."

The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . . ."

The Eighth Amendment says that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Few, if any, of these guarantees, I assume, would be applicable to Art. I tribunals exercising legislative or administrative functions. But are any of them inapplicable in criminal prosecutions where the "judicial Power" of the United States is exercised?

I have been unable to see how that is possible. Yet if those aspects of "judicial Power," as the term is used in Art. III, are all applicable, how can the requirements for an independent judiciary be made an exception? For it is as clearly required by Art. III for any exercise of "judicial Power" as are the other guarantees.

The legislative history of the District of Columbia Court Reform and Criminal Procedure Act of 1970 makes abundantly clear that one main purpose was the creation of some political leverage over Superior Court judges. As the Senate Report states:

> "In drafting the tenure provision of the amended bill, the committee was conscious both of the inexactness of the art of judicial selection and of the importance of tenure in attracting the most competent men to the bench. The committee recognized that the constitutional requirement of 'good behavior' tenure has played a significant role in the historic high quality of the Federal bench. On the other hand, the committee was aware that virtually no State has provided such tenure for its judges, an apparent recognition that the opportunity to review the quality of a judge's performance also has its obvious advantages. The committee, therefore, sought a tenure provision that would combine the attractiveness of the federal system with the opportunity for some review of the judge's work.
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> . . . . .
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> "At present, the only means available to rid the local bench of a sick or venal judge is through the process of impeachment by the House of Repre-

> sentatives and trial by the U. S. Senate. To believe that the Congress at this time in our history has the time to police the local judiciary through the impeachment process is just not realistic. That process has not even proven viable when the conduct of Federal, good-behavior tenure judges is drawn into question." S. Rep. No. 91–405, pp. 8, 11.

In *O'Donoghue* v. *United States,* 289 U. S. 516, the Court held unconstitutional an Act of Congress reducing the salaries of trial and appellate judges in the District of Columbia. It held that inherent in the separation of powers was the idea that "the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." *Id.,* at 530. Since the District was formed of portions of two of the original States, the Court concluded it was "not reasonable to assume that the cession stripped them of these [rights, guarantees, and immunities of the Constitution], and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." *Id.,* at 540. The Court concluded that while Congress could not confer administrative or legislative functions on Art. III courts, it could grant such functions to District courts by reason of Art. I. *Id.,* at 546. But that power, it held, may not be used "to destroy the operative effect of the judicial clause within the District." *Ibid.* The present Act does precisely that. Hence today we make a major retreat from *O'Donoghue.*

Much is made of the fact that many States (about three-fourths of them) have their judges at all levels elected by the people. That was one of the basic Jacksonian principles. But the principle governing federal judges is strongly opposed.[8] Hamilton stated the proposition in No. 79 of the Federalist (J. Cooke ed. 1961):

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the president, is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government, in every state, have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances

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[8] See Brown, The Rent in Our Judicial Armor, 10 Geo. Wash. L. Rev. 127 (1941); Hyde, Judges: Their Selection and Tenure, 22 N. Y. U. L. Q. Rev. 389 (1947); E. Haynes, Selection and Tenure of Judges (1944); Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. Chi. L. Rev. 665 (1969).

James Bryce, writing in 1888, said: "Any one of the three phenomena I have described—popular elections, short terms, and small salaries—would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wirepullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms . . . oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence." 1 American Commonwealth, c. 42, p. 507 (3d ed. 1905).

> shewn that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States 'shall at *stated times* receive for their services a compensation, which shall not be *diminished* during their continuance in office.'
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> "This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him."

That theory is opposed to the Jacksonian philosophy concerning election of state judges. But the present statutory scheme for control over Superior Court judges is even opposed to the Jacksonian theory. In the District of Columbia the people do not elect these Art. I judges. Nor do they "recall" them as is done in some States. The Superior Court judges are named by the President and confirmed by the Senate and they are removable by a commission appointed by the President. The Superior Court judge has no opportunity to put his problems, his conduct, his behavior on the bench to the people. The gun of the commission is held at his head. All of the normal vices of a dependent, removable judiciary are accentuated in the District of Columbia.

The matter of "law and order" naturally assumes in the minds of a majority of the people in the District an acute and special problem. A minority, however, sits as overlord, causing tensions to mount. The case of Harry Alexander, a judge on the Superior Court, has become prominent. Great pressures have been put on him to conform—or else. The problem goes not only to the viability of life in the District but to the vitality of the guarantees in Art. III and in the Bill of Rights. Those guarantees run to every "person"; and the judges on the Art. III courts who sit in the District dispense justice evenly and never undertake to ration it. But some judges, like the Bill of Rights, are in the minds of some a threat to our security.

They, however, insure our security by administering justice evenhandedly. The ideals of Art. III and the Bill of Rights provide the mucilage which holds majorities and minorities together in the federal segment of our Nation, and make tolerable the existence of nonconformists who do not walk to the measure of the beat of the Chief Drummer.

We take a great step backward today when we deprive our federal regime in the District of that judicial independence which helps insure fearless and evenhanded dispensation of justice. No federal court exercising Art. III judicial power should be made a minion of any cabal that from accidents of politics comes into the ascendancy as an overlord of the District of Columbia. That effort unhappily succeeds today and is in disregard of one of our most cherished constitutional provisions.

As Mr. Justice Black and I put it in our dissent in *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 589, 598, the essential problem in dealing with a "judicial" function exercised by an Art. I court concerns the standards and procedures employed. If the power exercised is "judicial power" defined in Art. III, as was true in the present case, then the standards and procedures must conform to Art. III, one of which is an independent judiciary.

There have been many proposals in our history that are kin to those approved today; and the important ones are reviewed by Prof. Kurland.[9] To date efforts to tamper with the federal judiciary have not been successful, unless it be the bizarre decision of this Court in *Chandler* v. *Judicial Council,* 382 U. S. 1003, 1004, in which Mr. Justice Black and I dissented. The States, of course, have mostly gone the other way.[10] But as Prof. Kurland observed: [11]

> "[T]he various devices that the States have recently adopted for policing their judiciaries are little more than polite blackmail, suggestions that the bar is unhappy with the judge's behavior and he'd better shape up or else. I shudder to think how [easily] the federal courts might have been deprived of the

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[9] Kurland, *supra,* n. 8.

[10] The California system is discussed by Jack E. Frankel, Executive Secretary of the California Commission On Judicial Qualifications, in Removal of Judges: California Tackles an Old Problem, 49 A. B. A. J. 166 (1963). Mr. Frankel was quoted with approval in the Senate Report proposing the District of Columbia Court Reform and Criminal Procedure Act of 1970. S. Rep. No. 91-405, p. 11.

[11] Kurland, *supra,* n. 8, at 668.

> services of Judge Learned Hand under such a system as California's. For politeness to counsel and a willingness to tolerate fools gladly were not among his virtues, and it is only such virtues and that of regular attendance at the court house that the policing systems seem capable of evoking from timid judges."

The way to achieve what is done today is by constitutional amendment. President Andrew Johnson in 1868 said:[12]

> "It is strongly impressed on my mind that the tenure of office by the judiciary of the United States during good behavior for life is incompatible with the spirit of republican government, and in this opinion I am fully sustained by the evidence of popular judgment upon this subject in the different States of the Union.
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> "I therefore deem it my duty to recommend an amendment to the Constitution by which the terms of the judicial officers would be limited to a period of years, and I herewith present it in the hope that Congress will submit it to the people for their decision."

Manipulated judiciaries are common across the world, especially in communist and fascist nations. The faith in freedom which we profess and which is opposed to those ideologies assumes today an ominous cast. It is ominous because it indirectly associates the causes of crime with the Bill of Rights rather than with the sociological factors of poverty caused by unemployment and disemployment, the abrasive political tactics used against minorities, the blight of narcotics and the like. Those who hold the gun at the heads of Superior Court judges can retaliate against those who respect the spirit of the Fourth Amendment and the Fifth Amendment and who stand firmly against the ancient practice of using the third degree to get confessions and who fervently believe that the end does not justify the means.

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[12] 8 Messages and Papers of the Presidents 3841 (J. Richardson ed. 1897).

I would reverse the judgment below.

UNITED STATES *v.* RUSSELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–1585. Argued February 27, 1973—Decided April 24, 1973

An undercover narcotics agent investigating respondent and his confederates for illicitly manufacturing a drug, offered them an essential ingredient which was difficult to obtain, though legally available. After the agent had observed the process and contributed the ingredient in return for a share of the finished product, respondent was found guilty by a jury which had been given the standard entrapment instruction. The Court of Appeals reversed, concluding that there had been "an intolerable degree of governmental participation in the criminal enterprise." *Held:* The entrapment defense, which, as explicated in *Sorrells* v. *United States,* 287 U. S. 435, and *Sherman* v. *United States,* 356 U. S. 369, prohibits law enforcement officers from instigating criminal acts by otherwise innocent persons in order to lure them to commit crimes and punish them, did not bar the conviction of respondent in view of the evidence of respondent's involvement in making the drug before and after the agent's visits, and respondent's concession "that he may have harbored a predisposition to commit the charged offenses." Nor was the agent's infiltration of the drug-making operation of such a nature as to violate fundamental principles of due process. Pp. 428–436.

459 F. 2d 671, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 436. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 439.

Deputy Solicitor General Lacovara argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Petersen, Edward R. Korman, Jerome M. Feit,* and *Roger A. Pauley.*

Thomas H. S. Brucker, by appointment of the Court, 409 U. S. 946, argued the cause for respondent. With him on the brief was *Robert E. Prince.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Richard Russell was charged in three counts of a five-count indictment returned against him and codefendants John and Patrick Connolly.[1] After a jury trial in the District Court, in which his sole defense was entrapment, respondent was convicted on all three counts of having unlawfully manufactured and processed methamphetamine ("speed") and of having unlawfully sold and delivered that drug in violation of 21 U. S. C. §§ 331 (q)(1), (2), 360a (a), (b) (1964 ed., Supp. V). He was sentenced to concurrent terms of two years in prison for each offense, the terms to be suspended on the condition that he spend six months in prison and be placed on probation for the following three years. On appeal, the United States Court of Appeals for the Ninth Circuit, one judge dissenting, reversed the conviction solely for the reason that an undercover agent supplied an essential chemical for manufacturing the methamphetamine which formed the basis of respondent's conviction. The court concluded that as a matter of law "a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." 459 F. 2d 671, 673 (1972). We granted certiorari, 409 U. S. 911 (1972), and now reverse that judgment.

**Paul G. Chevigny* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] John Connolly did not appear for trial. Patrick Connolly was tried with the respondent and found guilty of all five counts against him. The validity of his conviction is not before us in this proceeding.

There is little dispute concerning the essential facts in this case. On December 7, 1969, Joe Shapiro, an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs, went to respondent's home on Whidbey Island in the State of Washington where he met with respondent and his two codefendants, John and Patrick Connolly. Shapiro's assignment was to locate a laboratory where it was believed that methamphetamine was being manufactured illicitly. He told the respondent and the Connollys that he represented an organization in the Pacific Northwest that was interested in controlling the manufacture and distribution of methamphetamine. He then made an offer to supply the defendants with the chemical phenyl-2-propanone, an essential ingredient in the manufacture of methamphetamine, in return for one-half of the drug produced. This offer was made on the condition that Agent Shapiro be shown a sample of the drug which they were making and the laboratory where it was being produced.

During the conversation, Patrick Connolly revealed that he had been making the drug since May 1969 and since then had produced three pounds of it.[2] John Connolly gave the agent a bag containing a quantity of methamphetamine that he represented as being from "the last batch that we made." Shortly thereafter, Shapiro and Patrick Connolly left respondent's house to view the laboratory which was located in the Connolly house on Whidbey Island. At the house, Shapiro observed an empty bottle bearing the chemical label phenyl-2-propanone.

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[2] At trial Patrick Connolly admitted making this statement to Agent Shapiro but asserted that the statement was not true.

By prearrangement, Shapiro returned to the Connolly house on December 9, 1969, to supply 100 grams of propanone and observe the manufacturing process. When he arrived he observed Patrick Connolly and the respondent cutting up pieces of aluminum foil and placing them in a large flask. There was testimony that some of the foil pieces accidentally fell on the floor and were picked up by the respondent and Shapiro and put into the flask.[3] Thereafter, Patrick Connolly added all of the necessary chemicals, including the propanone brought by Shapiro, to make two batches of methamphetamine. The manufacturing process having been completed the following morning, Shapiro was given one-half of the drug and respondent kept the remainder. Shapiro offered to buy, and the respondent agreed to sell, part of the remainder for $60.

About a month later, Shapiro returned to the Connolly house and met with Patrick Connolly to ask if he was still interested in their "business arrangement." Connolly replied that he was interested but that he had recently obtained two additional bottles of phenyl-2-propanone and would not be finished with them for a couple of days. He provided some additional methamphetamine to Shapiro at that time. Three days later Shapiro returned to the Connolly house with a search warrant and, among other items, seized an empty 500-gram bottle of propanone and a 100-gram bottle, not the one he had provided, that was partially filled with the chemical.

There was testimony at the trial of respondent and Patrick Connolly that phenyl-2-propanone was generally difficult to obtain. At the request of the Bureau of

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[3] Agent Shapiro did not otherwise participate in the manufacture of the drug or direct any of the work.

Narcotics and Dangerous Drugs, some chemical supply firms had voluntarily ceased selling the chemical.

At the close of the evidence, and after receiving the District Judge's standard entrapment instruction,[4] the jury found the respondent guilty on all counts charged. On appeal, the respondent conceded that the jury could have found him predisposed to commit the offenses, 459 F. 2d, at 672, but argued that on the facts presented there was entrapment as a matter of law. The Court of Appeals agreed, although it did not find the District Court had misconstrued or misapplied the traditional standards governing the entrapment defense. Rather, the court in effect expanded the traditional notion of entrapment, which focuses on the predisposition of the defendant, to mandate dismissal of a criminal prosecution whenever the court determines that there has been "an intolerable degree of governmental participation in the criminal enterprise." In this case the court decided that the conduct of the agent in supplying a scarce ingredient essential for the manufacture of a controlled substance established that defense.

This new defense was held to rest on either of two alternative theories. One theory is based on two lower court decisions which have found entrapment, regardless of predisposition, whenever the government supplies contraband to the defendants. *United States* v. *Bueno,* 447

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[4] The District Judge stated the governing law on entrapment as follows: "Where a person already has the willingness and the readiness to break the law, the mere fact that the government agent provides what appears to be a favorable opportunity is not entrapment." He then instructed the jury to acquit respondent if it had a "reasonable doubt whether the defendant had the previous intent or purpose to commit the offense . . . and did so only because he was induced or persuaded by some officer or agent of the government." No exception was taken by respondent to this instruction.

F. 2d 903 (CA5 1971); *United States* v. *Chisum*, 312 F. Supp. 1307 (CD Cal. 1970). The second theory, a nonentrapment rationale, is based on a recent Ninth Circuit decision that reversed a conviction because a government investigator was so enmeshed in the criminal activity that the prosecution of the defendants was held to be repugnant to the American criminal justice system. *Greene* v. *United States*, 454 F. 2d 783 (CA9 1971). The court below held that these two rationales constitute the same defense, and that only the label distinguishes them. In any event, it held that "[b]oth theories are premised on fundamental concepts of due process and evince the reluctance of the judiciary to countenance 'overzealous law enforcement.'" 459 F. 2d, at 674, quoting *Sherman* v. *United States*, 356 U. S. 369, 381 (1958) (Frankfurter, J., concurring in result).

This Court first recognized and applied the entrapment defense in *Sorrells* v. *United States*, 287 U. S. 435 (1932).[5] In *Sorrells*, a federal prohibition agent visited the defendant while posing as a tourist and engaged him in conversation about their common war experiences. After gaining the defendant's confidence, the agent asked for some liquor, was twice refused, but upon asking a third time the defendant finally capitulated, and was subsequently prosecuted for violating the National Prohibition Act.

Mr. Chief Justice Hughes, speaking for the Court, held that as a matter of statutory construction the defense of entrapment should have been available to the defendant. Under the theory propounded by the Chief Justice, the entrapment defense prohibits law enforcement officers from instigating a criminal act by persons "otherwise innocent in order to lure them to its commission and to punish them." 287 U. S., at 448. Thus, the thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant to commit the crime. "[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Id.,* at 451.

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[5] The first case to recognize and sustain a claim of entrapment by government officers as a defense was apparently *Woo Wai* v. *United States*, 223 F. 412 (CA9 1915).

Mr. Justice Roberts concurred but was of the view "that courts must be closed to the trial of a crime instigated by the government's own agents." *Id.,* at 459.[6] The difference in the view of the majority and the concurring opinions is that in the former the inquiry focuses on the predisposition of the defendant, whereas in the latter the inquiry focuses on whether the government "instigated the crime."

In 1958 the Court again considered the theory underlying the entrapment defense and expressly reaffirmed the view expressed by the *Sorrells* majority. *Sherman* v. *United States, supra.* In *Sherman* the defendant was convicted of selling narcotics to a Government informer. As in *Sorrells,* it appears that the Government agent gained the confidence of the defendant and, despite initial reluctance, the defendant finally acceded to the repeated importunings of the agent to commit the criminal act. On the basis of *Sorrells,* this Court reversed the affirmance of the defendant's conviction.

In affirming the theory underlying *Sorrells,* Mr. Chief Justice Warren for the Court, held that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U. S., at 372. Mr. Justice Frankfurter stated in an opinion concurring in the result that he believed Mr. Justice Roberts had the better view in *Sorrells* and would have framed the question to be asked in an entrapment defense in terms of "whether the police conduct revealed in the particular case falls below standards . . . for the proper use of governmental power." *Id.,* at 382.[7]

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[6] Justices Brandeis and Stone concurred in this analysis.

In the instant case, respondent asks us to reconsider the theory of the entrapment defense as it is set forth in the majority opinions in *Sorrells* and *Sherman.* His principal contention is that the defense should rest on constitutional grounds. He argues that the level of Shapiro's involvement in the manufacture of the methamphetamine was so high that a criminal prosecution for the drug's manufacture violates the fundamental principles of due process. The respondent contends that the same factors that led this Court to apply the exclusionary rule to illegal searches and seizures, *Weeks* v. *United States,* 232 U. S. 383 (1914); *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and confessions, *Miranda* v. *Arizona,* 384 U. S. 436 (1966), should be considered here. But he would have the Court go further in deterring undesirable official conduct by requiring that any prosecution be barred absolutely because of the police involvement in criminal activity. The analogy is imperfect in any event, for the principal reason behind the adoption of the exclusionary rule was the Government's "failure to observe its own laws." *Mapp* v. *Ohio, supra,* at 659. Unlike the situations giving rise to the holdings in *Mapp* and *Miranda,* the Government's conduct here violated no independent constitutional right of the respondent. Nor did Shapiro violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise.

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[7] Justices DOUGLAS, Harlan, and BRENNAN shared the views of entrapment expressed in the Frankfurter opinion.

Respondent would overcome this basic weakness in his analogy to the exclusionary rule cases by having the Court adopt a rigid constitutional rule that would preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent "supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels." Even if we were to surmount the difficulties attending the notion that due process of law can be embodied in fixed rules, and those attending respondent's particular formulation, the rule he proposes would not appear to be of significant benefit to him. For, on the record presented, it appears that he cannot fit within the terms of the very rule he proposes.[8]

The record discloses that although the propanone was difficult to obtain, it was by no means impossible. The defendants admitted making the drug both before and after those batches made with the propanone supplied by Shapiro. Shapiro testified that he saw an empty bottle labeled phenyl-2-propanone on his first visit to the laboratory on December 7, 1969. And when the laboratory was searched pursuant to a search warrant on January 10, 1970, two additional bottles labeled phenyl-2-propanone were seized. Thus, the facts in the record amply demonstrate that the propanone used in the illicit manufacture of methamphetamine not only *could* have been obtained without the intervention of Shapiro but was in fact obtained by these defendants.

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California,* 342 U. S. 165 (1952), the instant case is distinctly not of that breed. Shapiro's contribution of propanone to the criminal enterprise already in process was scarcely objectionable. The chemical is by itself a harmless substance and its possession is legal. While the Government may have been seeking to make it more difficult for drug rings, such as that of which respondent was a member, to obtain the chemical, the evidence described above shows that it nonetheless was obtainable. The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment. *Kinsella* v. *United States ex rel. Singleton,* 361 U. S. 234, 246 (1960).

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[8] The language quoted above first appeared in the Government's brief at 32, but was subsequently adopted by the respondent. Brief for Respondent 20-21.

The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or "shocking to the universal sense of justice," *Kinsella, supra.*

Respondent also urges, as an alternative to his constitutional argument, that we broaden the nonconstitutional defense of entrapment in order to sustain the judgment of the Court of Appeals. This Court's opinions in *Sorrells* v. *United States, supra,* and *Sherman* v. *United States, supra,* held that the principal element in the defense of entrapment was the defendant's predisposition to commit the crime. Respondent conceded in the Court of Appeals, as well he might, "that he may have harbored a predisposition to commit the charged offenses." 459 F. 2d, at 672. Yet he argues that the jury's refusal to find entrapment under the charge submitted to it by the trial court should be overturned and the views of Justices Roberts and Frankfurter, in *Sorrells* and *Sherman,* respectively, which make the essential element of the defense turn on the type and degree of governmental conduct, be adopted as the law.

We decline to overrule these cases. *Sorrells* is a precedent of long standing that has already been once reexamined in *Sherman* and implicitly there reaffirmed. Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable.[9]

Critics of the rule laid down in *Sorrells* and *Sherman* have suggested that its basis in the implied intent of Congress is largely fictitious, and have pointed to what they conceive to be the anomalous difference between the treatment of a defendant who is solicited by a private individual and one who is entrapped by a government agent. Questions have been likewise raised as to whether "predisposition" can be factually established with the requisite degree of certainty. Arguments such as these, while not devoid of appeal, have been twice previously made to this Court, and twice rejected by it, first in *Sorrells* and then in *Sherman.*

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[9] A bill currently before the Congress contemplates an express statutory formulation of the entrapment defense. S. 1, 93d Cong., 1st Sess., § 1-3B2 (1973).

We believe that at least equally cogent criticism has been made of the concurring views in these cases. Commenting in *Sherman* on Mr. Justice Roberts' position in *Sorrells* that "although the defendant could claim that the Government had induced him to commit the crime, the Government could not reply by showing that the defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents," *Sherman* v. *United States,* 356 U. S., at 376–377, Mr. Chief Justice Warren quoted the observation of Judge Learned Hand in an earlier stage of that proceeding:

> " 'Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret.' *United States* v. *Sherman,* 200 F. 2d 880, 882." *Sherman* v. *United States,* 356 U. S., at 377 n. 7.

Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed. We are content to leave the matter where it was left by the Court in *Sherman:*

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'A different question is presented when the criminal design origi-

> nates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" *Id.,* at 372, quoting *Sorrells* v. *United States,* 287 U. S., at 442.

Several decisions of the United States district courts and courts of appeals have undoubtedly gone beyond this Court's opinions in *Sorrells* and *Sherman* in order to bar prosecutions because of what they thought to be, for want of a better term, "overzealous law enforcement." But the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. We think that the decision of the Court of Appeals in this case quite unnecessarily introduces an unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman.*

Those cases establish that entrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government.

Sorrells and *Sherman* both recognize "that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution," 287 U. S., at 441; 356 U. S., at 372. Nor will the mere fact of deceit defeat a prosecution, see, *e. g., Lewis* v. *United States,* 385 U. S. 206, 208–209 (1966), for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

Respondent's concession in the Court of Appeals that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment. He was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent had left the scene. He was, in the words of *Sherman, supra,* not an "unwary innocent" but an "unwary criminal." The Court of Appeals was wrong, we believe, when it sought to broaden the principle laid down in *Sorrells* and *Sherman.* Its judgment is therefore

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

A federal agent supplied the accused with one chemical ingredient of the drug known as methamphetamine ("speed") which the accused manufactured and for which act he was sentenced to prison. His defense was entrapment, which the Court of Appeals sustained and which the Court today disallows. Since I have an opposed view of entrapment, I dissent.

My view is that of Mr. Justice Brandeis expressed in *Casey* v. *United States,* 276 U. S. 413, 421 (dissent), that of Mr. Justice Frankfurter stated in *Sherman* v. *United States,* 356 U. S. 369, 378 (concurring in result), and that of Mr. Justice Roberts contained in *Sorrells* v. *United States,* 287 U. S. 435, 453 (concurrence).

In my view, the fact that the chemical ingredient supplied by the federal agent might have been obtained from other sources is quite irrelevant. Supplying the chemical ingredient used in the manufacture of this batch of "speed" made the United States an active participant in the unlawful activity. As stated by Mr. Justice Brandeis, dissenting in *Casey* v. *United States, supra,* at 423:

> "I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of detectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."

Mr. Justice Frankfurter stated the same philosophy in *Sherman* v. *United States, supra,* at 382–383: "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." And he added: "The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime . . . ." *Id.*, at 384.

Mr. Justice Roberts in *Sorrells* put the idea in the following words:

> "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy." 287 U. S., at 459.

May the federal agent supply the counterfeiter with the kind of paper or ink that he needs in order to get a quick and easy arrest? The Court of Appeals in *Greene* v. *United States*, 454 F. 2d 783, speaking through Judges Hamley and Hufstedler, said "no" in a case where the federal agent treated the suspects "as partners" with him, offered to supply them with a still, a still site, still equipment, and an operator and supplied them with sugar. *Id.*, at 786.

The Court of Appeals in *United States* v. *Bueno*, 447 F. 2d 903, speaking through Judges Roney, Coleman, and Simpson, held that where an informer purchased heroin for the accused who in turn sold it to a federal agent, there was entrapment because the sale was made "through the creative activity of the government." *Id.*, at 906.

In *United States* v. *Chisum*, 312 F. Supp. 1307, the federal agent supplied the accused with the counterfeit money, the receipt of which was the charge against him. Judge Ferguson sustained the defense of entrapment saying, "When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it." *Id.*, at 1312.

The Court of Appeals in the instant case relied upon this line of decisions in sustaining the defense of entrapment, 459 F. 2d 671. In doing so it took the view that the "prostitution of the criminal law," as Mr. Justice Roberts described it in *Sorrells,* 287 U. S., at 457, was the evil at which the defense of entrapment is aimed.

Federal agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative brain behind the illegal scheme. That is what the federal agent did here when he furnished the accused with one of the chemical ingredients needed to manufacture the unlawful drug.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

It is common ground that "[t]he conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents." *Lopez* v. *United States,* 373 U. S. 427, 434 (1963). For the Government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it. *Sherman* v. *United States,* 356 U. S. 369, 372 (1958). As Mr. Justice Brandeis put it, the Government "may not provoke or create a crime and then punish the criminal, its creature." *Casey* v. *United States,* 276 U. S. 413, 423 (1928) (dissenting opinion). It is to prevent this situation from occurring in the administration of federal criminal justice that the defense of entrapment exists. *Sorrells* v. *United States,* 287 U. S. 435 (1932); *Sherman* v. *United States, supra.* Cf. *Masciale* v. *United States,* 356 U. S. 386 (1958); *Lopez* v. *United States, supra.* But the Court has been sharply divided as to the proper basis, scope, and focus of the entrapment defense, and as to whether, in the absence of a conclusive showing, the issue of entrapment is for the judge or the jury to determine.

I

In *Sorrells* v. *United States, supra,* and *Sherman* v. *United States, supra,* the Court took what might be called a "subjective" approach to the defense of entrapment. In that view, the defense is predicated on an unexpressed intent of Congress to exclude from its criminal statutes the prosecution and conviction of persons, "otherwise innocent," who have been lured to the commission of the prohibited act through the Government's instigation. *Sorrells* v. *United States, supra,* at 448. The key phrase in this formulation is "otherwise innocent," for the entrapment defense is available under this approach only to those who would not have committed the crime but for the Government's inducements. Thus, the subjective approach focuses on the conduct and propensities of the particular defendant in each individual case: if he is "otherwise innocent," he may avail himself of the defense; but if he had the "predisposition" to commit the crime, or if the "criminal design" originated with him, then—regardless of the nature and extent of the Government's participation—there has been no entrapment. *Id.,* at 451. And, in the absence of a conclusive showing one way or the other, the question of the defendant's "predisposition" to the crime is a question of fact for the jury. The Court today adheres to this approach.

The concurring opinion of Mr. Justice Roberts, joined by Justices Brandeis and Stone, in the *Sorrells* case, and that of Mr. Justice Frankfurter, joined by Justices DOUGLAS, Harlan, and BRENNAN, in the *Sherman* case, took a different view of the entrapment defense. In their concept, the defense is not grounded on some unexpressed intent of Congress to exclude from punishment under its statutes those otherwise innocent persons tempted into crime by the Government, but rather on the belief that "the methods employed on behalf of the Government to bring about conviction cannot be countenanced." *Sherman* v. *United States, supra,* at 380. Thus, the focus of this approach is not on the propensities and predisposition of a specific defendant, but on "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." *Id.,* at 382. Phrased another way, the question is whether—regardless of the predisposition to crime of the particular defendant involved—the governmental agents have acted in such a way as is likely to instigate or create a criminal offense. Under this approach, the determination of the lawfulness of the Government's conduct must be made—as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury.

In my view, this objective approach to entrapment advanced by the Roberts opinion in *Sorrells* and the Frankfurter opinion in *Sherman* is the only one truly consistent with the underlying rationale of the defense.[1] Indeed, the very basis of the entrapment defense itself demands adherence to an approach that focuses on the conduct of the governmental agents, rather than on whether the defendant was "predisposed" or "otherwise innocent." I find it impossible to believe that the purpose of the defense is to effectuate some unexpressed congressional intent to exclude from its criminal statutes persons who committed a prohibited act, but would not have done so except for the Government's inducements. For, as Mr. Justice Frankfurter put it, "the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged." *Sherman* v. *United States, supra,* at 379. See also *Sorrells* v. *United States, supra,* at 456 (Roberts, J., concurring). Since, by definition, the entrapment defense cannot arise unless the defendant actually committed the proscribed act, that defendant is manifestly covered by the terms of the criminal statute involved.

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[1] Both the Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminal Laws § 702, and the American Law Institute's Model Penal Code § 2.13 (Proposed Official Draft, 1962), adopt this objective approach.

Furthermore, to say that such a defendant is "otherwise innocent" or not "predisposed" to commit the crime is misleading, at best. The very fact that he has committed an act that Congress has determined to be illegal demonstrates conclusively that he is not innocent of the offense. He may not have originated the precise plan or the precise details, but he was "predisposed" in the sense that he has proved to be quite capable of committing the crime. That he was induced, provoked, or tempted to do so by government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked, or tempted by a private person—which, of course, would not entitle him to cry "entrapment." Since the only difference between these situations is the identity of the tempter, it follows that the significant focus must be on the conduct of the government agents, and not on the predisposition of the defendant.

The purpose of the entrapment defense, then, cannot be to protect persons who are "otherwise innocent." Rather, it must be to prohibit unlawful governmental activity in instigating crime. As Mr. Justice Brandeis stated in *Casey* v. *United States, supra,* at 425: "This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the

Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts." Cf. *Olmstead* v. *United States,* 277 U. S. 438, 470 (1928) (Holmes, J., dissenting); *id.,* at 485 (Brandeis, J., dissenting). If that is so, then whether the particular defendant was "predisposed" or "otherwise innocent" is irrelevant; and the important question becomes whether the Government's conduct in inducing the crime was beyond judicial toleration.

Moreover, a test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove the defendant's predisposition. It allows the prosecution, in offering such proof, to rely on the defendant's bad reputation or past criminal activities, including even rumored activities of which the prosecution may have insufficient evidence to obtain an indictment, and to present the agent's suspicions as to why they chose to tempt this defendant. This sort of evidence is not only unreliable, as the hearsay rule recognizes; but it is also highly prejudicial, especially if the matter is submitted to the jury, for, despite instructions to the contrary, the jury may well consider such evidence as probative not simply of the defendant's predisposition, but of his guilt of the offense with which he stands charged.

More fundamentally, focusing on the defendant's innocence or predisposition has the direct effect of making what is permissible or impermissible police conduct depend upon the past record and propensities of the particular defendant involved. Stated another way, this subjective test means that the Government is permitted to entrap a person with a criminal record or bad reputation, and then to prosecute him for the manufactured crime, confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway.

Yet, in the words of Mr. Justice Roberts:

> "Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. . . . To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction." *Sorrells* v. *United States, supra,* at 458-459.

And as Mr. Justice Frankfurter pointed out:

> "Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities." *Sherman* v. *United States, supra,* at 383.

In my view, a person's alleged "predisposition" to crime should not expose him to government participation in the criminal transaction that would be otherwise unlawful.[2]

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[2] See Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L. J. 1091, 1111 (1951):

"Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wire tapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is a substitute for

This does not mean, of course, that the Government's use of undercover activity, strategy, or deception is necessarily unlawful. *Lewis* v. *United States,* 385 U. S. 206, 208–209 (1966). Indeed, many crimes, especially so-called victimless crimes, could not otherwise be detected. Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so. *Osborn* v. *United States,* 385 U. S. 323, 331–332 (1966). See also *Sherman* v. *United States, supra,* at 383–384 (Frankfurter, J., concurring).

But when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice.[3]

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skillful and scientific investigation. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the 'criminal classes,' justifies the employment of illegal means."

[3] Several federal courts have adopted the objective test advanced by Mr. Justice Roberts and Mr. Justice Frankfurter, or a variant thereof, focusing on the conduct of the government agents, rather than the "predisposition" of the particular defendant. See, *e. g., United States* v. *McGrath,* 468 F. 2d 1027, 1030–1031 (CA7 1972); *Greene* v. *United States,* 454 F. 2d 783, 786–787 (CA9 1971); *Carbajal-Portillo* v. *United States,* 396 F. 2d 944, 948 (CA9 1968); *Smith* v. *United States,* 118 U. S. App. D. C. 38, 44, 46, 331 F. 2d 784, 790, 792 (1964) (*en banc*); *United States* v. *Chisum,* 312 F. Supp. 1307 (CD Cal. 1970). Cf. *United States* v. *Morrison,* 348 F. 2d 1003, 1004 (CA2 1965); *Accardi* v. *United States,* 257 F. 2d 168, 172–173, n. 5 (CA5 1958); *United States* v. *Kros,* 296 F. Supp. 972, 979 (ED Pa. 1969). Moreover, this objective approach is the one

II

In the case before us, I think that the District Court erred in submitting the issue of entrapment to the jury, with instructions to acquit only if it had a reasonable doubt as to the respondent's predisposition to committing the crime. Since, under the objective test of entrapment, predisposition is irrelevant and the issue is to be decided by the trial judge, the Court of Appeals, I believe, would have been justified in reversing the conviction on this basis alone. But since the appellate court did not remand for consideration of the issue by the District Judge under an objective standard, but rather found entrapment as a matter of law and directed that the indictment be dismissed, we must reach the merits of the respondent's entrapment defense.

Since, in my view, it does not matter whether the respondent was predisposed to commit the offense of which he was convicted, the focus must be, rather, on the conduct of the undercover government agent. What the agent did here was to meet with a group of suspected producers of methamphetamine, including the respondent; to request the drug; to offer to supply the chemical phenyl-2-propanone in exchange for one-half of the methamphetamine to be manufactured therewith; and, when that offer was accepted, to provide the needed chemical ingredient, and to purchase some of the drug from the respondent.

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favored by a majority of the commentators. In addition to the Proposed New Federal Criminal Code and the Model Penal Code, *supra,* n. 1, see Williams, The Defense of Entrapment and Related Problems in Criminal Prosecution, 28 Fordham L. Rev. 399 (1959); Cowen, The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons, 49 J. Crim. L. C. & P. S. 447 (1959); Donnelly, *supra,* n. 2; Comment, Entrapment in the Federal Courts, 1 U. San Francisco L. Rev. 177 (1966).

It is undisputed that phenyl-2-propanone is an essential ingredient in the manufacture of methamphetamine; that it is not used for any other purpose; and that, while its sale is not illegal, it is difficult to obtain, because a manufacturer's license is needed to purchase it, and because many suppliers, at the request of the Federal Bureau of Narcotics and Dangerous Drugs, do not sell it at all. It is also undisputed that the methamphetamine which the respondent was prosecuted for manufacturing and selling was all produced on December 10, 1969, and that all the phenyl-2-propanone used in the manufacture of that batch of the drug was provided by the government agent. In these circumstances, the agent's undertaking to supply this ingredient to the respondent, thus making it possible for the Government to prosecute him for manufacturing an illicit drug with it, was, I think, precisely the type of governmental conduct that the entrapment defense is meant to prevent.

Although the Court of Appeals found that the phenyl-2-propanone could not have been obtained without the agent's intervention—that "there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients," 459 F. 2d 671, 672—the Court today rejects this finding as contradicted by the facts revealed at trial. The record, as the Court states, discloses that one of the respondent's accomplices, though not the respondent himself, had obtained phenyl-2-propanone from independent sources both before and after receiving the agent's supply, and had used it in the production of methamphetamine. This demonstrates, it is said, that the chemical was obtainable other than through the government agent; and hence the agent's furnishing it for the production of the methamphetamine involved in this prosecution did no more than afford an opportunity for its production to one ready and willing to produce it. Cf. *Osborn* v. *United States, supra,* at 331–332. Thus, the argument seems to be, there was no entrapment here, any more than there would have been if the agent had furnished common table salt, had that been necessary to the drug's production.

It cannot be doubted that if phenyl-2-propanone had been wholly unobtainable from other sources, the agent's undercover offer to supply it to the respondent in return for part of the illicit methamphetamine produced therewith—an offer initiated and carried out by the agent for the purpose of prosecuting the respondent for producing methamphetamine—would be precisely the type of governmental conduct that constitutes entrapment under any definition. For the agent's conduct in that situation would make possible the commission of an otherwise totally impossible crime, and, I should suppose, would thus be a textbook example of instigating the commission of a criminal offense in order to prosecute someone for committing it.

But assuming in this case that the phenyl-2-propanone was obtainable through independent sources, the fact remains that that used for the particular batch of methamphetamine involved in all three counts of the indictment with which the respondent was charged—*i. e.,* that produced on December 10, 1969—was supplied by the Government. This essential ingredient was indisputably difficult to obtain, and yet what was used in committing the offenses of which the respondent was convicted was offered to the respondent by the Government agent, on the agent's own initiative, and was readily supplied to the respondent in needed amounts. If the chemical was so easily available elsewhere, then why did not the agent simply wait until the respondent had himself obtained the ingredients and produced the drug, and then buy it from him? The very fact that the agent felt it incumbent upon him to offer to supply phenyl-2-propanone in return for the drug casts considerable doubt on the theory that the chemical could easily have been procured without the agent's intervention, and that therefore the agent merely afforded an opportunity for the commission of a criminal offense.

In this case, the chemical ingredient was available only to licensed persons, and the Government itself had requested suppliers not to sell that ingredient even to people with a license. Yet the Government agent readily offered, and supplied, that ingredient to an unlicensed person and asked him to make a certain illegal drug with it. The Government then prosecuted that person for making the drug produced *with the very ingredient* which its agent had so helpfully supplied. This strikes me as the very pattern of conduct that should be held to constitute entrapment as a matter of law.[4]

It is the Government's duty to prevent crime, not to promote it. Here, the Government's agent asked that the illegal drug be produced for him, solved his quarry's practical problems with the assurance that he could provide the one essential ingredient that was difficult to obtain, furnished that element as he had promised, and bought the finished product from the respondent—all so that the respondent could be prosecuted for producing and selling the very drug for which the agent had asked and for which he had provided the necessary component.

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[4] Some federal courts have ordered indictments for receipt, possession, or sale of contraband to be dismissed, upon a showing that Government agents themselves had supplied the contraband. See *United States* v. *McGrath, supra; Greene* v. *United States, supra; United States* v. *Bueno,* 447 F. 2d 903 (CA5 1971); *United States* v. *Chisum, supra; United States* v. *Dillet,* 265 F. Supp. 980 (SDNY 1966). The same considerations obtain here.

Under the objective approach that I would follow, this respondent was entrapped, regardless of his predisposition or "innocence."

In the words of Mr. Justice Roberts:

> "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy." *Sorrells* v. *United States, supra,* at 459.

I would affirm the judgment of the Court of Appeals.

TONASKET *v.* WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 71-1031. Argued December 12-13, 1972—Decided April 24, 1973

79 Wash. 2d 607, 488 P. 2d 281, vacated and remanded.

Robert L. Pirtle argued the cause and filed briefs for appellant.

Slade Gorton, Attorney General of Washington, argued the cause for appellees. With him on the brief were *Timothy R. Malone,* Senior Assistant Attorney General, and *William D. Dexter,* Assistant Attorney General.

Alvin J. Ziontz argued the cause and filed a brief for Confederated Tribes of the Colville Reservation et al. as *amici curiae.*[*]

PER CURIAM.

The judgment of the Supreme Court of Washington is vacated, and the case is remanded to that Court for reconsideration in light of §§ 6 and 7 of c. 157, 1972 Extraordinary Session Laws of the State of Washington, and this Court's decision in *McClanahan* v. *Arizona State Tax Comm'n, ante,* p. 164.

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[*] Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Frizzell, Harry R. Sachse,* and *Edmund B. Clark* for the United States; by *Charles A. Hobbs* and *Richard A. Baenen* for the National Congress of American Indians; by *David H. Getches* for the Native American Rights Fund; and by Pearson, Yurok Indian and Trader on the Hoopa Reservation.

William D. Dexter, Assistant Attorney General of Washington, and *Eugene F. Corrigan* filed a brief for Multistate Tax Commission as *amicus curiae* urging affirmance.

BROWN, SECRETARY OF STATE OF CALIFORNIA *v.* CHOTE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 71-1583. Argued February 22, 1973—Decided May 7, 1973

Appellee, who sought to run for Congress but asserted that he was unable to pay California's statutory filing fee, filed a class action in District Court, challenging the constitutionality of the filing-fee statutes. In the face of an impending filing deadline, the District Court granted appellee's motion for a preliminary injunction. *Held:* Given the possibility that appellee would prevail on the merits and the fact that appellee's opportunity to be a candidate would have been foreclosed, absent interim relief, the District Court did not abuse its discretion in granting a preliminary injunction. Pp. 456-457.

342 F. Supp. 1353, affirmed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Henry G. Ullerich, Deputy Attorney General of California, argued the cause for appellant. With him on the brief were *Evelle J. Younger,* Attorney General, and *Iver E. Skjeie,* Assistant Attorney General.

Philip Elman, by appointment of the Court, 409 U. S. 1035, argued the cause and filed a brief for appellee.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case arises under 28 U. S. C. § 1253 on direct appeal from a three-judge district court in the Northern District of California. The court was convened pursuant to 28 U. S. C. § 2281 when appellee called into

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**Melvin L. Wulf, Sanford J. Rosen, Marguerite Buckley, A. L. Wirin, Fred Okrand,* and *Laurence R. Sperber* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

question the constitutionality of those provisions of the California Elections Code which require candidates in a primary election to pay a filing fee prior to having their names listed on the primary ballot. Cal. Elections Code §§ 6552 and 6553 (Supp. 1973). Under these provisions, candidates for the Federal House of Representatives must pay $425 (1% of the annual salary of the office); candidates for the Federal Senate must pay $850 (2% of the salary of the office). Those wishing to run for statewide offices must pay similar fees ranging in amount from $192 for State Assemblyman (1% of the annual salary) to $982 for Governor (2% of the annual salary). Other portions of the California Elections Code, not challenged in the present suit, require prospective candidates to file with appropriate state officials a declaration of candidacy and sponsor certificates. Cal. Elections Code §§ 6490–6491, 6494–6495 (1961 and Supp. 1973).

Appellee commenced this class action on March 3, 1972. He moved, and was granted permission by, a single district judge, to proceed *in forma pauperis* and as his own attorney. In his complaint, appellee asserted that he wished to become a candidate for the Federal House of Representatives from the 17th District of California, and had taken the following steps to place his name in nomination in the June 6, 1972, California primary election. On February 17, 1972, appellee called the Registrar of Voters of Santa Clara County, an official designated by state law to dispense those forms necessary to place a name in nomination. Appellee was purportedly told by the Registrar or a member of his office that he was required to pay $425 in advance in order to secure blank copies of the necessary papers. According to appellee, the Registrar's Office also advised him that the papers would be delivered in exchange for a worthless check.[1]

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[1] The State denies that such advice was ever communicated to appellee. In an affidavit submitted to the District Court, the Regis-

Appellee proceeded immediately to the Registrar's Office where he presented a personal check for $425 and requested copies of the necessary forms. Across the face of the check, appellee had typed "Written under protest for filing fee." [2] The Registrar issued the requisite papers to appellee and informed him that his check would be forwarded to the California Secretary of State when his completed papers were submitted. Subsequently, a Deputy Secretary of State informed appellee that his name would not be placed on the ballot if his check was not honored.[3]

Citing *Bullock* v. *Carter*, 405 U. S. 134 (1972), appellee asserted that California's filing-fee system was unconstitutional since it barred indigents, such as himself, from seeking elective office and from voting for the candidate of his choice. In addition to requesting declaratory and permanent injunctive relief, appellee moved the District Court to issue a preliminary injunction so as to allow him to participate as a candidate in the upcoming primary. Under state law, the final date on which appellee could submit nominating papers for that primary was March 10, 1972, one week away.

Because of the impending filing deadline, the District Court proceeded quickly to set the case for argument.

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trar of Voters of Santa Clara County stated that it was the policy of his office not to distribute the required forms to anyone who represented to the Registrar that the check submitted was worthless. The Registrar further stated that, to his knowledge, neither he nor anyone in his office had ever informed appellee that forms would be issued upon presentation of a worthless check.

[2] When the case was argued before the District Court, appellee claimed that he had also told the Registrar or a member of his office that the account on which the check was drawn did not contain sufficient funds to cover it. However, this fact is not alleged in the complaint.

[3] Appellant submitted to the District Court an affidavit from the Deputy Secretary of State to whom appellee had spoken, disputing appellee's claim that he had been informed that his name would not be placed on the ballot if his check was not honored.

On March 3, 1972, the same date on which the suit was filed, the single District Judge to whom the case was assigned entered an order requiring appellant to show cause why interlocutory relief should not be granted. The State was given five days in which to respond. It was not until March 7 that the Chief Judge of the Ninth Circuit was notified of the application for a three-judge court. On March 8, he designated the judges who were to compose the panel. On the same day, the court convened and heard oral argument. Because of the speed with which the case had developed, neither the court nor appellee had an opportunity prior to the hearing to consider appellant's return to the order to show cause, the only paper which the State had been able to prepare.

On March 9, 1972, one day after oral argument and one day before the deadline for filing nomination papers, the District Court granted appellee's motion for a preliminary injunction, stating:

> "Since no . . . showing has been made by the State, concerning either the necessity, the purpose or the reasonableness of the filing fee statutes in question, we conclude that within the rationale and holding of *Bullock* [v. *Carter,* 405 U. S. 134 (1972)], *plaintiff may prevail on the merits* and that, absent a preliminary injunction, his constitutional right may be irreparably lost." 342 F. Supp. 1353, 1355–1356. (Emphasis added.)

Under the terms of the preliminary injunction, the State was required to allow appellee and others similarly situated to place their names on the ballot without paying the required fee, so long as they were otherwise eligible for the applicable state or federal office and had deposited with an appropriate state official an affidavit attesting to their indigency.

The State appealed directly to this Court under 28 U. S. C. § 1253. Its Jurisdictional Statement posed two questions:

> "Under the decision of this Court in *Bullock* v. *Carter*, 405 U. S. 134 (1972), when a state statute requiring a candidate's filing fee of one per cent (1%) of the first year's salary for the office is challenged on Equal Protection grounds does the 'rational basis' or 'close scrutiny' standard of judicial review apply?
>
> "Do California Elections Code sections 6552 and 6553 deny voters or indigent prospective candidates equal protection of the laws?"

Thus, the State of California, for reasons not clear to us in light of the limited record, asked the Court to address itself to the ultimate merits of appellee's constitutional claim, a question which the District Court did not reach. In the present posture of the case, there is no occasion to consider any issues beyond those addressed by the District Court.

The issuance of the requested preliminary injunction was the only action taken by the District Court. In determining whether such relief was required, that court properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted, absent interlocutory relief. As the District Court opinion clearly evidences, issuance of the injunction reflected the balance which that court reached in weighing these factors and was not in any sense intended as a final decision as to the constitutionality of the challenged statute. In the exigent circumstances, the grant of extraordinary interim relief was a permissible choice; but on the very limited record before the District Court a decision on the merits would not have been appropriate.

In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. *Alabama* v. *United States,* 279 U. S. 229 (1929); *United States* v. *Corrick,* 298 U. S. 435 (1936); *United Fuel Gas Co.* v. *Public Service Comm'n of West Virginia,* 278 U. S. 322 (1929); *National Fire Insurance Co. of Hartford* v. *Thompson,* 281 U. S. 331 (1930). In light of the arguments presented by appellee and the fact that appellee's opportunity to be a candidate would have been foreclosed, absent some relief, we cannot conclude that the court's action was an abuse of discretion. We therefore affirm the action taken by the District Court in granting interim relief.

In doing so, we intimate no view as to the ultimate merits of appellee's contentions. The record in this case clearly reflects the limited time which the parties had to assemble evidence and prepare their arguments. While the District Court's swift action is understandable in view of the deadline which it faced, the resulting record was simply insufficient to allow that court to consider fully the grave, far-reaching constitutional questions presented.

The specific deadline which led the District Court to grant equitable relief has now passed.[4] Nothing precludes appellee from seeking a trial on the merits, if he chooses to proceed. The case is therefore remanded to the District Court for further proceedings consistent with this opinion.[5]

Affirmed and remanded.

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[4] Although the June 6 primary election has passed, the question raised is one "capable of repetition, yet evading review." Consequently, the case is not moot. *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911); *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969).

[5] We have granted certiorari in No. 71–6852, *Lubin* v. *Allison, post,* p. 964, in order to consider conflicts in holdings regarding the constitutionality of state filing-fee statutes.

FEDERAL POWER COMMISSION *v.* MEMPHIS LIGHT, GAS & WATER DIVISION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-486. Argued March 27, 1973—Decided May 7, 1973*

Section 441 of the Tax Reform Act of 1969 does not deprive the Federal Power Commission of the authority to permit a utility that is subject to its jurisdiction under the Natural Gas Act to change the depreciation method that it uses for purposes of ratemaking from accelerated depreciation with "flow through" of the utility's tax savings to customers to accelerated depreciation with normalization (where the income tax expense allowed in the cost of service is computed on a straight-line depreciation basis) with respect to pre-1970 property as well as replacement property. Pp. 465-474.

149 U. S. App. D. C. 238, 462 F. 2d 853, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court.

Samuel Huntington argued the cause for petitioner in No. 72-486. With him on the brief were *Solicitor General Griswold, Leo E. Forquer,* and *George W. McHenry, Jr. Christopher T. Boland* argued the cause for petitioner in No. 72-488. With him on the briefs were *Melvin Richter* and *Robert O. Koch.*

George E. Morrow argued the cause for respondent Memphis Light, Gas & Water Division in both cases. With him on the brief was *Reuben Goldberg. Richard A. Solomon* argued the cause and filed a brief for respondent Public Service Commission for the State of New York in both cases. *Charles F. Wheatley, Jr.,* and

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*Together with No. 72-488, *Texas Gas Transmission Corp.* v. *Memphis Light, Gas & Water Division et al.,* also on certiorari to the same court.

William T. Miller filed a brief for respondent American public Gas Assn. in both cases.†

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

We granted certiorari in these cases to determine whether § 441 of the Tax Reform Act of 1969, 26 U. S. C. § 167 (*l*), circumscribes the authority of the Federal Power Commission under the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*, to permit a regulated utility to change its method of computing depreciation for ratemaking purposes from "flow-through" to "normalization" with respect to property acquired prior to 1970 as well as "replacement" property.

Since the resolution of this issue depends largely on the background and history of § 441 and the Commission's regulatory powers, a brief review is in order at the outset. Section 167 of the Internal Revenue Code authorized taxpayers, including regulated utilities, to use accelerated or liberalized depreciation in calculating their federal income taxes.[1] The Commission retained jurisdiction to prescribe the depreciation method to be used by regulated utilities in calculating their federal income tax expense for ratemaking purposes.[2] Initially, the Commission required utilities to compute their cost of service, which includes federal income taxes, as if they were using straight-line depreciation. This method, referred to as "normalization," was designed to avoid giving the present customers of a utility the benefits of tax deferral attributable to accelerated depreciation. If a utility used accelerated depreciation in determining its actual tax liability, the difference between the taxes actually paid and the higher taxes reflected as a cost of service for ratemaking purposes was required to be placed in a deferred tax reserve account. See *Amere Gas Utilities Co.,* 15 F. P. C. 760.

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†Briefs of *amici curiae* urging reversal in both cases were filed by *Jerome J. McGrath* for the Independent Natural Gas Association of America, and by *Thomas M. Debevoise* for Jersey Central Power & Light Co. et al.

[1] Section 167 (a) provides that "[t]here shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)" of qualified property. Section 167 (b) defines "reasonable allowance" to include an allowance computed under the declining balance method and the sum-of-the-years-digits method, as well as the straight-line method. Under the declining-balance and sum-of-the-years-digits method, both commonly referred to as accelerated or liberalized depreciation methods, depreciation allowances in the early years are higher than under the straight-line method, but steadily decrease over the useful life of the asset. Under the straight-line method, the depreciation allowance for an asset remains equal over its useful life.

It soon became apparent that accelerated depreciation in practice resulted in permanent tax savings. Because most utilities had growing or at least stable plant investments, the depreciation allowances from additional and replacement equipment offset the declining depreciation allowance on existing property. Accordingly, the Commission required utilities using accelerated depreciation for tax purposes to use the same method for calculating their cost of service and, thus, to "flow through" any tax savings to their customers. *Alabama-Tennessee Natural Gas Co.,* 31 F. P. C. 208, aff'd *sub nom. Alabama-Tennessee Natural Gas Co.* v. *FPC,* 359 F. 2d 318 (CA5). Subsequently, the Commission decided that it would impute the use of accelerated depreciation for ratemaking purposes regardless of the method used for computing actual taxes. *Midwestern Gas Transmission Co.,* 36

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[2] Federal income taxes are properly included as an expense under the cost-of-service ratemaking utilized by the Commission in the regulation of rates for sales of natural gas subject to its jurisdiction under the Natural Gas Act, 15 U. S. C. § 717 *et seq.* See *FPC* v. *United Gas Pipe Line Co.,* 386 U. S. 237, 243.

F. P. C. 61, aff'd *sub nom. Midwestern Gas Transmission Co.* v. *FPC,* 388 F. 2d 444 (CA7).

When the House and Senate considered tax reform legislation in 1969, both were concerned with the loss of tax revenues that stemmed from the combined effect of accelerated depreciation for computing federal taxes (leading to higher deductions) and flow-through for fixing rates (leading to lower rates and thus lower gross revenues).[3] Section 441 of the Tax Reform Act, which added § 167 (*l*) to the Internal Revenue Code, was designed in general to "freeze" existing depreciation practices.[4] As passed by the House, § 441 would have established three rules with respect to existing depreciable property: [5]

> "(1) If straight line depreciation is presently being taken, then no faster depreciation is to be permitted as to that property.
>
> "(2) If the taxpayer is taking accelerated depreciation and is 'normalizing' its deferred taxes, then it must go to the straight line method unless it continues to normalize as to that property.
>
> "(3) If the taxpayer is taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes, then the taxpayer must continue to do so, unless the appropriate regulatory agency permits a change as to that property."

The Senate bill as passed was similar to that of the House, except that utilities on flow-through were given the right to elect within 180 days "to shift from the flow-through to the straight-line method, with or without the permission of the appropriate regulatory agency, or . . .

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[3] See H. R. Rep. No. 91-413, pt. 1, pp. 131-132; S. Rep. No. 91-552, p. 172.

[4] See H. R. Rep. No. 91-413, pt. 1, pp. 132-133; S. Rep. No. 91-552, p. 172.

[5] H R. Rep. No. 91-413, pt. 1, p. 133.

with the permission of the regulatory agency to shift to the normalization method . . . ."[6] This election was to apply both to new and existing property. In conference, however, it was agreed that this right of election would apply only to property acquired by the utility after 1969 to expand its facilities.[7]

Thus, as added to the Internal Revenue Code in 1969, § 167 (*l*) distinguishes between two basic types of "public utility property":[8] "pre-1970 property," which is property acquired by the taxpayer before January 1, 1970 (§ 167 (*l*)(3)(B)), and all other property, referred to as "post-1969 property" (§ 167 (*l*)(3)(C)). A further distinction is drawn between post-1969 property "which increases the productive or operational capacity of the taxpayer" (expansion property) and post-1969 property which merely replaces existing property (§ 167 (*l*)(4)(A)). With respect to pre-1970 property, a utility may use (1) straight-line depreciation, (2) the method used prior to August 1969 if it also employs normalization, or (3) accelerated depreciation with flow-through, but only if that method was used prior to August 1969

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[6] S. Rep. No. 91-552, p. 173.

[7] See H. R. Conf. Rep. No. 91-782, p. 313.

[8] Section 167 (*l*)(3)(A) provides:

"The term 'public utility property' means property used predominantly in the trade or business of the furnishing or sale of—

"(i) electrical energy, water, or sewage disposal services,

"(ii) gas or steam through a local distribution system,

"(iii) telephone services, or other communication services if furnished or sold by the Communications Satellite Corporation for purposes authorized by the Communications Satellite Act of 1962 (47 U. S. C. [§] 701), or

"(iv) transportation of gas or steam by pipeline,

"if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision thereof."

(§ 167 (*l*)(1)). With respect to post-1969 property, a utility may use (1) straight-line depreciation, (2) accelerated depreciation with normalization, or (3) accelerated depreciation with flow-through if the utility used flow-through prior to August 1969 (§ 167 (*l*)(2)). In addition, under § 167 (*l*)(4)(A), a utility may elect to abandon accelerated depreciation with flow-through with respect to post-1969 expansion property.

The proceedings in issue here involve Texas Gas Transmission Corp., the operator of a major interstate pipeline system certificated by the Federal Power Commission. Although Texas Gas utilized accelerated depreciation with flow-through prior to the adoption of the Tax Reform Act, it filed a proposed rate increase with the Commission on June 27, 1969, based upon "the proposed discontinuance of the use of liberalized depreciation and the reversion to a straight-line method of tax depreciation." After § 167 (*l*) was enacted, Texas Gas advised the Commission that it intended to exercise the election provided in § 167(*l*)(4)(A) and sought permission to use accelerated depreciation with normalization with respect to its post-1969 expansion property.[9] It also sought assurance, before it made the election, that it would be able to change from flow-through to straight-line or, preferably, accelerated depreciation with normalization with respect to its pre-1970 property and post-1969 replacement property.

The Commission, holding that its authority "to determine whether a company may effect such a change is not diminished" under the Tax Reform Act, permitted Texas Gas to change from flow-through to normalization for ratemaking purposes. Opinion No. 578, 43 F. P. C. 824, 828, rehearing denied, 44 F. P. C. 140.[10] The Commission reasoned that the basis of its decisions in *Alabama-Tennessee* and *Midwestern* would no longer be applicable if Texas Gas were to switch to normalization with respect to post-1969 expansion property. In that event, the tax savings resulting from the deferral attributable to accelerated depreciation would not be permanent. Rather, if Texas Gas were required to continue flow-through for all but its new expansion property, it would be faced with a steadily increasing cost of service which would necessitate repeated rate increases. Under these circumstances, the Commission concluded: "Texas Gas is correct in contending that normalization in computing the tax allowance for rate purposes with respect to its pre-1970 facilities offers more hope for stability of rates for its customers and more assurance that the company can earn its fair rate of return without future rate increases. Further benefits of normalization are that it will improve the company's before tax coverage of interest, thereby enhancing the quality of its securities, and that it will help alleviate present day cash shortages." *Id.*, at 829–830.

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[9] In Order No. 404, 43 F. P. C. 740, rehearing denied, 44 F. P. C. 16, the Commission announced that as a general policy it would permit utilities making the election under § 167 (*l*)(4)(A) to use accelerated depreciation with normalization with respect to their expansion property. The Court of Appeals, in the same decision under review here, affirmed this order. 149 U. S. App. D. C. 238, 250, 462 F. 2d 853, 865. That part of the court's decision is not before us.

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[10] The Commission's order reads:

"(A) In the computation of its Federal Income Tax allowance for ratemaking purposes as well as for accounting purposes, Texas Gas is permitted to use liberalized depreciation with normalization with respect to its property other than that subject to election under Section 167 (*l*)(4)(A) of the Internal Revenue Code as amended by Section 441 of the Tax Reform Act of 1969. Such election applies to property constructed or acquired on or after January 1, 1970, to the extent it increases the productive or operational capacity of the company and does not represent the replacement of existing capacity. Texas Gas may reflect any such change in its rates, as well as any change in costs arising from its proposed election. In computing its cost-of-service for ratemaking purposes balances in Account 282 [deferred tax reserve account] should continue to be deducted from the rate base." 43 F. P. C. 824, 831.

The Court of Appeals, on petitions for review, reversed the Commission's order.[11] 149 U. S. App. D. C. 238, 462 F. 2d 853, rehearing denied, *id.*, at 250, 462 F. 2d, at 865. Although the Court recognized that the version of the Tax Reform Act passed by the House would have supported the Commission's order, it held that the limited nature of the election provision as finally passed deprived the Commission of authority to permit regulated utilties to abandon flow-through with respect to their existing and replacement property. We reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

The present cases concern solely the depreciation methods used by utilities in calculating their federal income tax expenses for ratemaking purposes.

In § 441 of the Tax Reform Act of 1969, Congress dealt primarily with a revenue measure under the tax laws and only indirectly with the regulatory power of the Commission under the Natural Gas Act. We have had before us on numerous occasions cases arising under the Natural Gas Act. In the early case of *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, we emphasized two aspects of the power of the Commission to fix "just and reasonable" rates under 15 U. S. C. § 717. First, was the desire "to protect consumers against exploitation," 320 U. S., at 610, and second, was the aim to promote the "financial integrity" of the natural gas companies as measured, not only by revenues sufficient to recover operating expenses and capital costs, *id.*, at 603, but also by revenues "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Ibid.* We mention those matters because (1) the treatment of depreciation bears on rates and (2) there is no indication in the legislative history of this tax measure that Congress desired to modify, as respects the precise issue involved here, the broad discretion of the Commission delineated in *Hope Natural Gas* and in other rate cases.

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[11] Memphis Light, Gas & Water Division, a municipally owned distributor of natural gas and a city-gate customer of Texas Gas, and the Public Service Commission of the State of New York petitioned the Court of Appeals for review of the Commission's Opinion No. 578. Each had filed an application for rehearing before the Commission which was denied in Opinion No. 578–A. Both the Federal Power Commission (in No. 72–486) and Texas Gas (in No. 72–488) petitioned this Court for a writ of certiorari.

Under § 4 (a) of the Natural Gas Act, 15 U. S. C. § 717c (a), all rates and charges made by a natural gas company subject to the Commission's jurisdiction must be "just and reasonable." Section 4 (e), 15 U. S. C. § 717c (e), sets forth the procedures whereby the Commission can determine whether a proposed rate schedule is lawful, and § 5, 15 U. S. C. § 717d, gives the Commission certain powers to fix rates and charges. Finally, under § 9 (a), 15 U. S. C. § 717h (a), the Commission may "require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe." In *FPC* v. *United Gas Pipe Line Co.*, 386 U. S. 237, 243, the Court stated:

> "One of [the Commission's] statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general

> proposition, is obviously within the jurisdiction of the Commission."

The lower courts have allowed the Commission broad discretion in determining proper depreciation methods for ratemaking purposes. See, *e. g., Alabama-Tennessee Natural Gas Go.* v. *FPC,* 359 F. 2d 318; *Midwestern Gas Transmission Co.* v. *FPC,* 388 F. 2d 444.

Section 167 (*l*), to be sure, does not leave this discretion untouched. For example, a utility using straight-line depreciation with respect to its pre-1970 property could not switch to accelerated depreciation, nor could a utility be required to switch to flow-through with respect to pre-1970 property. See § 167 (*l*)(1). But § 167 (*l*) on its face does not preclude the Commission from exercising its statutory powers to permit a utility to abandon flow-through. Section 167(*l*)(1)(B) provides that "[i]n the case of any pre-1970 public utility property, the taxpayer *may* use the applicable 1968 method for such property if—(i) the taxpayer used a flow-through method of accounting" prior to August 1969. (Emphasis added.)

The Court of Appeals, however, found error in the Commission's action based on its detailed and considered analysis of the legislative history of § 167 (*l*). It concluded that *"the final version of the bill limits the applicability of the right of election to post-1969 expansion (non-replacement) property alone."* 149 U. S. App. D. C., at 246, 462 F. 2d, at 861 (emphasis in original). It reasoned as follows. At the House stage the action of the Commission would have been justified to switch to normalization because, as already noted, the House Report stated: [12]

> "Your committee's bill provides that, in the case of *existing* property, the following rules are to apply:

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[12] H. R. Rep. No. 91-413, pt. 1, p. 133.

> "(1) If straight line depreciation is presently being taken, then no faster depreciation is to be permitted as to that property.
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> "(2) If the taxpayer is taking accelerated depreciation and is 'normalizing' its deferred taxes, then it must go to the straight line method unless it continues to normalize as to that property.
>
> "(3) If the taxpayer is taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes, then the taxpayer must continue to do so, *unless the appropriate regulatory agency permits a change as to that property.*" (Emphasis added.)

The word "existing" property as used in that Report included "replacement" property in the mind of the Court of Appeals.

The Senate version of the bill[13] would have permitted Texas Gas to shift from liberalized depreciation with flow-through either to straight-line depreciation or with the Commission's approval to liberalized depreciation with normalization. 149 U. S. App. D. C., at 247, 462 F. 2d, at 862.

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[13] S. Rep. No. 91-552, pp. 173-174

"The [Senate] committee amendments, while in most respects the same as the House provisions, differ in one principal area. The amendments permit an election to be made within 180 days after the date of enactment of the bill for a utility covered by this provision to shift from the flow-through to the straight-line method, *with or without the permission of the appropriate regulatory agency, or permit it with the permission of the regulatory agency to shift to the normalization method* (that is, to come under general rules of the bill).

"*This election applies both as to new and existing property*. . . . Since the company would no longer be permitted to use accelerated depreciation (unless the agency later permits it to normalize), the agency would not be able to impute the use of accelerated depreciation with flow-through." (Emphasis added.)

The Court of Appeals, however, concluded that because the right of election was restricted while the bill was in conference to apply only to post-1969 expansion property, the Commission could not permit a utility to change its method with respect to existing or replacement property. *Ibid.* It relied on the following four paragraphs from the Conference Report.[14]

> "The House bill provides that in the case of certain listed regulated industries (the furnishing or sale of . . . gas through a local distribution system, . . . and transportation of gas by pipeline) a taxpayer is *not permitted* to use accelerated depreciation *unless it 'normalizes'* the current income tax reduction resulting from the use of such accelerated depreciation. . . .
>
> "*This rule is not to apply in the case of a taxpayer that is at present flowing through the tax reduction to earnings for purposes of computing its allowable expenses on its regulated books of account.* Also, if the taxpayer is now using straight line depreciation as to any public utility property it may not change to accelerated depreciation as to that property.
>
> "The Senate amendment makes the following changes in the House bill: . . . (d) *an election is permitted to be made within 180 days after the date of enactment by a company at present on flow-through to come under the rules of the bill* . . . .
>
> "*The conference substitute (sec. 441 of the substitute and sec. 167 (l) of the code) follows the Senate amendment except that the special provision referred to in (e) above is stricken and the 180-day election (item (d), above) is modified to apply to new property and not to replacement property.*

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[14] H. R. Conf. Rep. No. 91-782, pp. 312-313.

> *Even in the case of new property, however, the right to change over from the flowthrough method is to be available only to the extent the new property increases the productive or operational capacity of the company.*" (Emphasis added.)

From these four paragraphs the Court of Appeals concluded that the second paragraph of the Conference Report prohibits Texas Gas from abandoning liberalized depreciation with flow-through and that the right of election was restricted to post-1969 expansion property only.

The second paragraph, however, as we read it, when it uses the words "This rule" refers, not to the final bill, but to the initial House bill. That initial bill, as summarized in the House Report, as already noted,[15] had somewhat different provisions for depreciation. The first paragraph of the quotation from the Conference Report in our view summarized the House's proposed second rule. The words "This rule" in the second paragraph, therefore, refer to the House's proposed second rule.[16] Only the third paragraph of the excerpt reached the changes made by the Senate. Only the fourth paragraph resolved the differences between the two bills. There is nothing in either the third or the fourth paragraph to indicate that the election authorized by the Conference Report was to limit or replace the three general rules proposed by the House, the third House-proposed rule[17] authorizing precisely what the Commission allowed in this case. The second paragraph, read in the context of the Conference Report, does not state that the Commission lacks authority to permit a company on flow-through to abandon it with respect to existing property. It only states that a company on flow-through may remain on flow-through. Thus, it is solely a limitation on the requirement that a company must normalize if it wants to continue accelerated depreciation with respect to pre-1970 property. This is entirely consistent with the structure of § 167 (*l*)(1).

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[15] H. R. Rep. No. 91-413, pt. 1, p. 133.

[16] The second rule, as noted, provided, "If the taxpayer is taking accelerated depreciation and is 'normalizing' its deferred taxes, then it must go to the straight line method unless it continues to normalize as to that property." *Ibid.*

[17] The third rule, as noted, provided, "If the taxpayer is taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes, then the taxpayer must continue to do so, unless the appropriate regulatory agency permits a change as to that property." *Ibid.*

Nor is the extension of the 180-day election to post-1969 expansion property a limiting factor. The "reasonable" allowance for depreciation of post-1969 property as used in § 167 (*l*)(2) includes in subparagraph (C) "the applicable 1968 method, if, with respect to its pre-1970 public utility property of the same (or similar) kind most recently placed in service, the taxpayer used a flow-through method of accounting for its July 1969 accounting period." But § 167 (*l*)(4)(A) provides that where the taxpayer makes an election within the 180-day period, paragraph (2)(C) shall not apply with respect to any post-1969 public utility property "to the extent that such property constitutes property which increases the productive or operational capacity of the taxpayer" and does not represent "the replacement of existing capacity."

Thus, the Act recognizes ways for a utility to abandon flow-through with respect to existing property. A utility cannot do so on its own; the overriding authority is in the Federal Power Commission. The staff of the Joint Committee on Internal Revenue Taxation prepared a General Explanation of this tax measure [18] in which it stated:

"If the taxpayer was taking accelerated deprecia-

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[18] General Explanation of the Tax Reform Act of 1969, H. R. 13270, 91st Cong., p. 151.

> tion and flowing through to its customers the benefits of the deferred taxes as of August 1, 1969, then the taxpayer would continue to do so (except for a special election procedure discussed below), unless the appropriate regulatory agency permits a change as to that property."

This document goes on to state[19] that as respects new property a utility on flow-through must remain on flow-through "unless the regulatory agency permits it to change (or unless the election below applies)."

This document provides a compelling contemporary indication that the Federal Power Commission was not deprived of its authority to permit abandonment of flow-through, even though utilities had the right not to have flow-through apply to their expansion property.

The Court of Appeals relied on comments both in the House[20] and in the Senate[21] Reports of the desire of Congress to "freeze" the current practices relating to depreciation especially as respects "the more flourishing utility industries."[22]

As we read the Reports, the purpose was to forestall switches to faster methods of depreciation, to guard against widespread rate increases, and to avoid putting some utilities at a competitive disadvantage. But the "freeze" was not put in absolute terms. Shifts from straight-line to accelerated depreciation were outlawed, as were shifts from normalization to flow-through on existing property. We find no trace of a suggestion that the Federal Power Commission was denied authority to determine whether on particular facts the abandonment of flow-through by a utility within the parameter of the

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[19] *Ibid.*

[20] H. R. Rep. No. 91-413, pt. 1, pp. 132-133.

[21] S. Rep. No. 91-552, p. 172

[22] *Ibid.*

Tax Reform Act of 1969 would be in the public interest as envisaged by the Natural Gas Act, even though it might increase rates. The "freeze" certainly was designed to cover changes to faster methods of tax depreciation but not changes to slower methods of tax depreciation that the Commission might permit.

The Court of Appeals sustained the Commission as respects the post-1969 expansion property of Texas Gas, and reversed it as respects the pre-1970 and post-1969 nonexpansion property. The Court of Appeals did not reach the validity of the Commission's order, assuming the Commission was correct in its reading of the Tax Reform Act of 1969, as we think it was. The Court of Appeals did, however, state that § 167 (*l*) "should not be construed to prevent" the Commission from finding in "extraordinary circumstances" that consumer interests "would be furthered by permitting the abandonment of flow-through." But it added: "It is clear, however, that such consumer interests would not be furthered by permitting Texas Gas to abandon flow-through in the circumstances presented by the case at bar." 149 U. S. App. D. C., at 250, 462 F. 2d, at 865. The Commission in its petition for certiorari states that in connection with the main question raised it would argue, if the petition were granted, that its decision on the merits was correct in all respects. And in its brief on the merits it urges us to decide the merits. But by statute[23] the Court of

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[23] Section 19 (b) of the Natural Gas Act, 15 U. S. C. § 717r (b), provides:

"Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia [Circuit] . . . ."

Appeals is the tribunal where review must be sought; and we remand the cases to it for proceedings consistent with this opinion. We note in closing, however, that the judgment of the Court of Appeals is reversed *in toto*. Its holding that the consumer interests were not furthered by the Commission's action is short of the application of the appropriate standard for review. As already noted, under *Hope Natural Gas* rates are "just and reasonable" only if consumer interests are protected and if the financial health of the pipeline in our economic system remains strong.

Reversed and remanded.

PREISER, CORRECTION COMMISSIONER, ET AL. v. RODRIGUEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-1369. Argued January 9, 1973—Decided May 7, 1973

Respondents were state prisoners who had elected to participate in New York's conditional-release program, by which a prisoner serving an indeterminate sentence may earn up to 10 days per month good-behavior-time credits toward reduction of his maximum sentence. For in-prison disciplinary reasons the good-time credits of each were canceled. Each respondent brought a civil rights action under 42 U. S. C. § 1983, in conjunction with a habeas corpus action, claiming that his credits were unconstitutionally canceled and seeking their restoration. The District Court in each case viewed the habeas corpus claim merely as an adjunct to the civil rights action, thus obviating the need for exhaustion of state remedies, and on the merits ruled for the respondent, a ruling that in each case entitled him to immediate release on parole. The Court of Appeals consolidated the actions and affirmed. *Held:* When a state prisoner challenges the fact or duration of his physical imprisonment and by way of relief seeks a determination that he is entitled to immediate release or a speedier release, his sole federal remedy is a writ of habeas corpus. Pp. 488–499.

(a) Although the broad language of § 1983 seems literally to apply, Congress' enactment of the specific federal habeas corpus statute, with its requirement that a state prisoner exhaust state remedies, was intended to provide the exclusive means of relief in this type of situation. Pp. 488–490.

(b) The policy of exhaustion in federal habeas corpus actions, which is rooted in considerations of federal-state comity, has as much relevance in an attack on the actions of the state prison administration as it does in an attack on the actions of a state court; and that policy applies here where respondents sought no damages, but only a ruling that they were entitled to immediate release or a speedier release. Pp. 490–494.

(c) Recent decisions of the Court relied on by respondents, upholding state prisoners' civil rights actions, are inapposite to the situation here, for the prisoners in those cases challenged only the conditions of their confinement, not the fact or duration of that confinement itself. Pp. 498–499.

456 F. 2d 79, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 500.

Lillian Z. Cohen, Assistant Attorney General of New York, argued the cause for petitioners. With her on the brief were *Louis J. Lefkowitz*, Attorney General, and *Samuel A. Hirshowitz*, First Assistant Attorney General.

Herman Schwartz argued the cause for respondents. With him on the brief were *Jack Greenberg, Stanley A. Bass*, and *Melvin L. Wulf*.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents in this case were state prisoners who were deprived of good-conduct-time credits by the New York State Department of Correctional Services as a result of disciplinary proceedings. They then brought actions in a federal district court, pursuant to the Civil Rights Act of 1871, 42 U. S. C. § 1983. Alleging that the Department had acted unconstitutionally in depriving them of the credits, they sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement in

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**Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *Doris H. Maier* and *Arlo E. Smith*, Assistant Attorneys General, and *Derald E. Granberg*, Deputy Attorney General, filed a brief for the State of California as *amicus curiae* urging reversal.

Robert Meserve, Robert Kutak, William Falsgraf, Daniel Skoler, and *Richard Singer* filed a brief for the American Bar Assn. as *amicus curiae* urging affirmance.

prison. The question before us is whether state prisoners seeking such redress may obtain equitable relief under the Civil Rights Act, even though the federal habeas corpus statute, 28 U. S. C. § 2254, clearly provides a specific federal remedy.

The question is of considerable practical importance. For if a remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a state forum. *Monroe* v. *Pape,* 365 U. S. 167, 183 (1961); *McNeese* v. *Board of Education,* 373 U. S. 668, 671 (1963); *Damico* v. *California,* 389 U. S. 416 (1967); *King* v. *Smith,* 392 U. S. 309, 312 n. 4 (1968); *Houghton* v. *Shafer,* 392 U. S. 639 (1968). If, on the other hand, habeas corpus is the exclusive federal remedy in these circumstances, then a plaintiff cannot seek the intervention of a federal court until he has first sought and been denied relief in the state courts, if a state remedy is available and adequate. 28 U. S. C. § 2254 (b).

The present consolidated case originated in three separate actions, brought individually by the three respondents. The respondent Rodriguez, having been convicted in a New York state court of perjury and attempted larceny, was sentenced to imprisonment for an indeterminate term of from one and one-half to four years. Under New York Correction Law § 803 and Penal Law §§ 70.30 (4)(a), 70.40 (1)(b), a prisoner serving an indeterminate sentence may elect to participate in a conditional-release program by which he may earn up to 10 days per month good-behavior-time credit toward reduction of the maximum term of his sentence. Rodriguez elected to participate in this program. Optimally, such a prisoner may be released on parole after having served approximately two-thirds of his maximum sentence (20 days out of every 30); but accrued good-behavior credits so earned may at any time be withdrawn, in whole or in part, for bad behavior or for violation of the institutional rules. N. Y. Correction Law § 803 (1).

Rodriguez was charged in two separate disciplinary action reports with possession of contraband material in his cell. The deputy warden determined that as punishment, 120 days of Rodriguez' earned good-conduct-time credits should be canceled, and that Rodriguez should be placed in segregation, where he remained for more than 40 days. In the "Remarks" section of the deputy warden's determination was a statement that Rodriguez had refused to disclose how he had managed to obtain possession of the items in question.

Rodriguez then filed in the District Court a complaint pursuant to § 1983, combined with a petition for a writ of habeas corpus. He asserted that he was not really being punished for possession of the contraband material, but for refusal to disclose how he had obtained it, and that he had received no notice or hearing on the charges for which he had ostensibly been punished. Thus, he contended that he had been deprived of his good-conduct-time credits without due process of law.

After a hearing, the District Court held that Rodriguez' suit had properly been brought under the Civil Rights Act, that the habeas corpus claim was "merely a proper adjunct to insure full relief if [Rodriguez] prevails in the dominant civil rights claim," 307 F. Supp. 627, 628–629 (1969), and that therefore Rodriguez was not required to exhaust his state remedies, as he would have had to do if he had simply filed a petition for habeas corpus. On the merits, the District Court agreed with Rodriguez that the questioning of him by prison officials related solely to the issue of how he had obtained the contraband materials, and that he had been ostensibly punished for something different—possession of the materials—on which he had had no notice or opportunity to answer. This, the court found, denied him due process of law, particularly in light of the fact that the prison regulations prescribed no penalty for failure to inform. The District Court further found that the Prison Commutation Board had failed to forward to the Commissioner of Correction written reasons for the cancellation of Rodriguez' good-conduct time, as required by former N. Y. Correction Law § 236, and that this, too, had deprived Rodriguez of due process and equal protection of the laws. Accordingly, the court declared the cancellation of 120 days' good-behavior-time credits unconstitutional, and directed the Commissioner of Correction to restore those credits to Rodriguez. Since, at that time, Rodriguez' conditional-release date had already passed, the District Court's order entitled him to immediate release from prison on parole.

The Court of Appeals reversed this decision by a divided vote. The appellate court not only disagreed with the District Court on the merits, but also held that Rodriguez' action was really a petition for habeas corpus and, as such, should not have been entertained by the District Court because Rodriguez had not exhausted his state remedies in accordance with § 2254 (b). As the Court of Appeals put it:

> "The present application, since it seeks release from custody, is in fact an application for habeas corpus. '[R]elease from penal custody is not an available remedy under the Civil Rights Act.' Peinado v. Adult Authority of Dept. of Corrections, 405 F. 2d 1185, 1186 (9th Cir.), cert. denied, 395 U. S. 968 (1969). In Johnson v. Walker, 317 F. 2d 418, 419–420 (5th Cir. 1963) the court said: 'Use of the Civil Rights Statutes to secure release of persons imprisoned by State Courts would thus have the effect of repealing 28 U. S. C. § 2254; of course, such was not the intent of Congress.'" *Rodriguez* v. *McGinnis*, 451 F. 2d 730, 731 (1971).

The judgment of the Court of Appeals was subsequently set aside, and the case was reheard *en banc*, as explained below.

The respondent Katzoff, who was serving a sentence of one to three years in prison following his conviction for possession of a dangerous weapon, also elected to participate in New York's conditional-release program. Disciplinary charges were brought against him for making derogatory comments about prison officials in his diary. As punishment, the deputy warden deprived him of 30 days' good-conduct time for these diary entries and confined him in segregation for 57 days. Katzoff ultimately lost 50 days' good-behavior-time credits—30 days directly and 20 additional days because he was unable to earn any good-conduct time while in segregation. He brought a civil rights complaint under § 1983, joined with a petition for habeas corpus, in Federal District Court, alleging that the prison officials had acted unconstitutionally.

The District Court held, in an unreported opinion, that Katzoff's failure to exhaust state remedies was no bar to his suit, since it was a civil rights action and the petition for a writ of habeas corpus was only an incidental adjunct to assure enforcement of the judgment. On the merits, the District Court found that there was no prison regulation against the keeping of a diary; that punishment for entries in a private diary violated Katzoff's constitutional rights to due process, equal protection, and freedom of thought; and that confining Katzoff in segregation for this offense constituted cruel and unusual punishment. The court, therefore, ordered that the 50 days' good-behavior-time credits be restored to Katzoff, and since this restoration entitled him to immediate release on parole, the court ordered such release.

The Court of Appeals reversed by a divided vote. Without reaching the merits of Katzoff's complaint, the appellate court held that his action was in essence an application for habeas corpus since it sought and obtained his immediate release from custody, and that therefore his complaint should have been dismissed because Katzoff had sought no relief whatever in the state courts and had made no showing that an adequate state remedy was unavailable. *United States ex rel. Katzoff* v. *McGinnis*, 441 F. 2d 558 (1971). This judgment of the Court of Appeals was subsequently set aside, and the case was reheard *en banc*, as explained below.

The respondent Kritsky's case is similar. While serving a prison sentence of 15 to 18 years under a state court conviction for armed robbery, he was charged by prison officials with being a leader in a prison-wide protest demonstration and with advocating insurrection during that demonstration. When brought before the warden and asked how he would plead, Kritsky stated "Not guilty." The warden then immediately and summarily imposed punishment on him—deprivation of 545 days' good-conduct-time credits, and confinement in segregation for four and one-half months, where he lost another 45 days' good time.

Kritsky subsequently filed a civil rights action, combined with a petition for habeas corpus, in Federal District Court, alleging that his summary punishment had deprived him of his good-time credits without due process of law. The District Court found Kritsky's complaint to be a proper civil rights action, and went on to rule that he had been denied due process by the imposition of summary punishment and by the failure of the Prison Commutation Board to file with the Commissioner written reasons for cancellation of Kritsky's good-time credits, as required by New York law. 313 F. Supp. 1247 (1970). Accordingly, the court ordered restoration of the 590 days' good-conduct-time credits, which entitled Kritsky to immediate release on parole.

An appeal was argued before a panel of the Court of Appeals; but, before decision, that Court ordered the case to be reheard *en banc*, together with the *Rodriguez* and *Katzoff* cases. After rehearing *en banc* of the three now-consolidated cases, the Court of Appeals, with three dissents, affirmed the judgments of the District Court in all of the cases "upon consideration of the merits and upon the authority of Wilwording v. Swenson, [404 U. S. 249] decided by the Supreme Court of the United States on December 14, 1971." *Rodriguez* v. *McGinnis,* 456 F. 2d 79, 80 (1972). Although eight judges wrote separate opinions, it is clear that the majority of the Court relied primarily on our opinion in the *Wilwording* case, holding that complaints of state prisoners relating to the conditions of their confinement were cognizable either in federal habeas corpus or under the Civil Rights Act, and that as civil rights actions they were not subject to any requirement of exhaustion of state remedies.

We granted certiorari *sub nom. Oswald* v. *Rodriguez,* 407 U. S. 919, in order to consider the bearing of the *Wilwording* decision upon the situation before us—where state prisoners have challenged the actual duration of their confinement on the ground that they have been unconstitutionally deprived of good-conduct-time credits, and where restoration of those credits would result in their immediate release from prison or in shortening the length of their confinement. In that context, the question whether a state prisoner may bring an action for equitable relief pursuant to § 1983, or whether he is limited to the specific remedy of habeas corpus, presents an unresolved and important problem in the administration of federal justice.

The problem involves the interrelationship of two important federal laws. The relevant habeas corpus statutes are 28 U. S. C. §§ 2241 and 2254. Section 2241 (c) provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . (3) [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . ." Section 2254 provides in pertinent part:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." [1]

The Civil Rights Act, 42 U. S. C. § 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

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[1] See also 28 U. S. C. § 2243, quoted in n. 12, *infra.*

> party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is clear, not only from the language of §§ 2241 (c)(3) and 2254 (a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody. By the end of the 16th century, there were in England several forms of habeas corpus, of which the most important and the only one with which we are here concerned was *habeas corpus ad subjiciendum*—the writ used to "inquir[e] into illegal detention with a view to an order releasing the petitioner." *Fay* v. *Noia,* 372 U. S. 391, 399 n. 5 (1963).[2] Whether the petitioner had been placed in physical confinement by executive direction alone,[3] or by order of a court,[4] or even by private parties,[5] habeas corpus was the proper means of challenging that confinement and seeking release. Indeed, in 1670, the Chief Justice of the Common Pleas was able to say, in ordering the immediate discharge of a juror who had been jailed by a trial judge for bringing in a verdict of not guilty, that "[t]he writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it." *Bushell's Case,* Vaughan 135, 136, 124 Eng. Rep. 1006, 1007.

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[2] Other forms of habeas corpus include *habeas corpus ad respondendum; ad satisfaciendum; ad prosequendum, testificandum, deliberandum;* and *ad faciendum et recipiendum.* See *Fay* v. *Noia,* 372 U. S. 391, 399 n. 5 (1963). But when the words "habeas corpus" are used alone, they have been considered a generic term understood to refer to the common-law writ of *habeas corpus ad subjiciendum,* which was the form termed the "great writ." *Ex parte Bollman,* 4 Cranch 75, 95 (1807).

[3] See, *e. g., Darnel's Case,* 3 How. St. Tr. 1–59 (K. B. 1627); Petition of Right, 3 Car. 1, c. 1 (1627); Habeas Corpus Act, 16 Car. 1, c. 10, §§ 3, 8 (1640). See also *Ex parte Wells,* 18 How. 307 (1856); *Ex parte Milligan,* 4 Wall. 2 (1866); *Parisi* v. *Davidson,* 405 U. S. 34 (1972).

[4] See, *e. g., Bushell's Case,* Vaughan 135, 124 Eng. Rep. 1006 (1670); *Fay* v. *Noia, supra.*

[5] See, *e. g., Rex* v. *Clarkson,* 1 Strange 444, 93 Eng. Rep. 625 (K. B. 1721); *Ford* v. *Ford,* 371 U. S. 187 (1962).

By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was thus an integral part of our common-law heritage. The writ was given explicit recognition in the Suspension Clause of the Constitution, Art. I, § 9, cl. 2;[6] was incorporated in the first congressional grant of jurisdiction to the federal courts, Act of Sept. 24, 1789, c. 20, § 14, 1 Stat. 81–82; and was early recognized by this Court as a "great constitutional privilege." *Ex parte Bollman,* 4 Cranch 75, 95 (1807). See *Fay* v. *Noia, supra,* at 399–415.

The original view of a habeas corpus attack upon detention under a judicial order was a limited one. The relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction. *E. g., Ex parte Kearney,* 7 Wheat. 38 (1822); *Ex parte Watkins,* 3 Pet. 193 (1830). But, over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction. See *Ex parte Lange,* 18 Wall. 163 (1874); *Ex parte Siebold,* 100 U. S. 371 (1880); *Ex parte Wilson,* 114 U. S. 417 (1885); *Moore* v. *Dempsey,* 261 U. S. 86 (1923); *Johnson* v. *Zerbst,* 304 U. S.

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[6] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

458 (1938); and *Waley* v. *Johnston,* 316 U. S. 101 (1942). See also *Fay* v. *Noia, supra,* at 405-409, and cases cited at 409 n. 17. Thus, whether the petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional, as in *Ex parte Siebold, supra;* that he has been imprisoned prior to trial on account of a defective indictment against him, as in *Ex parte Royall,* 117 U. S. 241 (1886); that he is unlawfully confined in the wrong institution, as in *In re Bonner,* 151 U. S. 242 (1894), and *Humphrey* v. *Cady,* 405 U. S. 504 (1972); that he was denied his constitutional rights at trial, as in *Johnson* v. *Zerbst, supra;* that his guilty plea was invalid, as in *Von Moltke* v. *Gillies,* 332 U. S. 708 (1948); that he is being unlawfully detained by the Executive or the military, as in *Parisi* v. *Davidson,* 405 U. S. 34 (1972); or that his parole was unlawfully revoked, causing him to be reincarcerated in prison, as in *Morrissey* v. *Brewer,* 408 U. S. 471 (1972)—in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement.[7]

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[7] It was not until quite recently that habeas corpus was made available to challenge less obvious restraints. In 1963, the Court held that a prisoner released on parole from immediate physical confinement was nonetheless sufficiently restrained in his freedom as to be in custody for purposes of federal habeas corpus. *Jones* v. *Cunningham,* 371 U. S. 236. In *Carafas* v. *LaVallee,* 391 U. S. 234 (1968), the Court for the first time decided that once habeas corpus jurisdiction has attached, it is not defeated by the subsequent release of the prisoner. And just this Term, in *Hensley* v. *Municipal Court, ante,* p. 345, we held that a person, who, after conviction, is released on bail or on his own recognizance, is "in custody" within the meaning of the federal habeas corpus statute. But those cases marked no more than a logical extension of the traditional meaning and purpose of habeas corpus—to effect release from illegal custody.

In the case before us, the respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus. They alleged that the deprivation of their good-conduct-time credits was causing or would cause them to be in illegal physical confinement, *i. e.,* that once their conditional-release date had passed, any further detention of them in prison was unlawful; and they sought restoration of those good-time credits, which, by the time the District Court ruled on their petitions, meant their immediate release from physical custody.

Even if the restoration of the respondents' credits would not have resulted in their immediate release, but only in shortening the length of their actual confinement in prison, habeas corpus would have been their appropriate remedy. For recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and obtain future releases. In *Peyton* v. *Rowe,* 391 U. S. 54 (1968), the Court held that a prisoner may attack on habeas the second of two consecutive sentences while still serving the first. The Court pointed out that the federal habeas corpus statute "does not deny the federal courts power to fashion appropriate relief other than immediate release. Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.' Rev. Stat. § 761 (1874), superseded by 28 U. S. C. § 2243." *Id.,* at 66–67. See also *Walker* v. *Wainwright,* 390 U. S. 335 (1968); *Carafas* v. *LaVallee,* 391 U. S. 234, 239 (1968); *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U. S. 484 (1973). So, even if restoration of respondents' good-time credits had merely shortened the length of their confinement, rather than required immediate discharge from that confinement, their suits would still have been within the core of habeas corpus in attacking the very duration of their physical confinement itself. It is beyond doubt, then, that the respondents could have sought and obtained fully effective relief through federal habeas corpus proceedings.[8]

Although conceding that they could have proceeded by way of habeas corpus, the respondents argue that the Court of Appeals was correct in holding that they were nonetheless entitled to bring their suits under § 1983 so as to avoid the necessity of first seeking relief in a state forum. Pointing to the broad language of § 1983,[9] they argue that since their complaints plainly came within the literal terms of that statute, there is no justifiable reason to exclude them from the broad remedial protection provided by that law. According to the respondents, state prisoners seeking relief under the Civil Rights Act should be treated no differently from any other civil rights plaintiffs, when the language of the Act clearly covers their causes of action.

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[8] Our Brothers in dissent state that the respondents' claims "could not, in all likelihood, have been heard on habeas corpus at the time the present habeas corpus statute was enacted in 1867, or at the time the exhaustion doctrine was first announced in *Ex parte Royall*, 117 U. S. 241 (1886), or at the time the requirement was codified in 1948 . . . ." *Post*, at 512–513. (Footnotes omitted.) This statement is apparently based on the assumption that, in those years, the respondents' habeas actions would have been barred by the "prematurity" doctrine, which precluded habeas relief that would have merely reduced the length of the prisoner's confinement rather than resulting in his immediate release, and which was not rejected until 1968, *Peyton* v. *Rowe*, 391 U. S. 54. We note, however, that the respondent Katzoff initiated his action more than a month after his alleged release date, and thus his claim, if accepted, entitled him to immediate release even as of the date on which he brought suit. Although Rodriguez initiated his action 15 days before his alleged release date, and Kritsky six months before such date, in both cases those dates had long passed at the time of the District Court's decisions, and these respondents were thus entitled to immediate release at that time. In any event, the nature of the respondents' suits was an attack on the legality of their physical confinement itself; and to deal with such attacks on physical custody, however imposed and whether or not related to conviction by a court, is the long-established function of habeas corpus. See *supra*, at 484–486.

[9] See *supra*, at 483–484.

The broad language of § 1983, however, is not conclusive of the issue before us. The statute is a general one, and, despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies. The respondents' counsel acknowledged at oral argument that a state prisoner challenging his underlying conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus. It was conceded that he cannot bring a § 1983 action, even though the literal terms of § 1983 might seem to cover such a challenge, because Congress has passed a more specific act to cover that situation, and, in doing so, has provided that a state prisoner challenging his conviction must first seek relief in a state forum, if a state remedy is available. It is clear to us that the result must be the same in the case of a state prisoner's challenge to the fact or duration of his confinement, based, as here, upon the alleged unconstitutionality of state administrative action. Such a challenge is just as close to the core of habeas corpus as an attack on the prisoner's conviction, for it goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration.

In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

The policy reasons underlying the habeas corpus statute support this conclusion. The respondents concede that the reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation—to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors. *Fay* v. *Noia, supra,* at 419–420. But they argue that this concern applies only to federal interference with state court convictions; and to support this argument, they quote from *Ex parte Royall, supra,* the case that first mandated exhaustion of state remedies as a precondition to federal habeas corpus:

> "The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, *between the judicial tribunals of the Union and of the States,* and in recognition of the fact that the public good requires that those relations be not disturbed by *unnecessary conflict between courts* equally bound to guard and protect rights secured by the Constitution." 117 U. S., at 251 (emphasis added).

In the respondents' view, the whole purpose of the exhaustion requirement, now codified in § 2254 (b), is to give state *courts* the first chance at remedying *their own* mistakes, and thereby to avoid "the unseemly spectacle of federal district courts trying the regularity of proceedings had in *courts* of coordinate jurisdiction." Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 172–173 (1948) (emphasis added). This policy, the respondents contend, does not apply when the challenge is not to the action of a state court, but, as here, to the action of a state administrative body. In that situation, they say, the concern with avoiding unnecessary interference by one court with the courts of another sovereignty with concurrent powers, and the importance of giving state courts the first opportunity to correct constitutional errors made by them, do not apply; and hence the purpose of the exhaustion requirement of the habeas corpus statute is inapplicable.

We cannot agree. The respondents, we think, view the reasons for the exhaustion requirement of § 2254 (b) far too narrowly. The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. That principle was defined in *Younger* v. *Harris,* 401 U. S. 37, 44 (1971), as "a proper respect for state functions," and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked. That comity considerations are not limited to challenges to the validity of state court convictions is evidenced by cases such as *Morrissey* v. *Brewer, supra,* where the petitioners' habeas challenge was to a state administrative decision to revoke their parole, and *Braden* v. *30th Judicial Circuit Court of Kentucky, supra,* where the petitioner's habeas attack was on the failure of state prosecutorial authorities to afford him a speedy trial.

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. In New York, for example, state judges sit on a regular basis at all but one of the State's correctional facilities, and thus inmates may present their grievances to a court at the place of their confinement, where the relevant records are available and where potential witnesses are located. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.[10]

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[10] The dissent argues that the respondents' attacks on the actions of the prison administration here are no different, in terms of the potential for exacerbating federal-state relations, from the attacks made by the petitioners in *McNeese* v. *Board of Education*, 373

Requiring exhaustion in situations like that before us means, of course, that a prisoner's state remedy must be adequate and available, as indeed § 2254 (b) provides. The respondents in this case concede that New York provided them with an adequate remedy for the restoration of their good-time credits, through § 79–c of the New York Civil Rights Law, which explicitly provides for injunctive relief to a state prisoner "for improper treatment where such treatment constitutes a violation of his constitutional rights." (Supp. 1972–1973.)

But while conceding the availability in the New York courts of an opportunity for equitable relief, the respondents contend that confining state prisoners to federal habeas corpus, after first exhausting state remedies, could deprive those prisoners of any damages remedy to which they might be entitled for their mistreatment, since damages are not available in federal habeas corpus proceedings, and New York provides no damages remedy at all for state prisoners. In the respondents' view, if habeas corpus is the exclusive federal remedy for a state prisoner attacking his confinement, damages might never be obtained, at least where the State makes no provision for them. They argue that even if such a prisoner were to bring a subsequent federal civil rights action for damages, that action could be barred by principles of

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U. S. 668 (1963), *Damico* v. *California*, 389 U. S. 416 (1967), and *Monroe* v. *Pape*, 365 U. S. 167 (1961), on the various state administrative actions there. Thus, it is said, since exhaustion of state remedies was not required in those cases, it is anomalous to require it here. *Post*, at 522. The answer, of course, is that in those cases, brought pursuant to § 1983, no other, more specific federal statute was involved that might have reflected a different congressional intent. In the present case, however, the respondents' actions fell squarely within the traditional purpose of federal habeas corpus, and Congress has made the specific determination in § 2254 (b) that requiring the exhaustion of adequate state remedies in such cases will best serve the policies of federalism.

res judicata where the state courts had previously made an adverse determination of his underlying claim, even though a federal habeas court had later granted him relief on habeas corpus.

The answer to this contention is that the respondents here sought no damages, but only equitable relief—restoration of their good-time credits—and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies. Cf. *Ray* v. *Fritz*, 468 F. 2d 586 (CA2 1972).

The respondents next argue that to require exhaustion of state remedies in a case such as the one at bar would deprive a state prisoner of the speedy review of his grievance which is so often essential to any effective redress. They contend that if, prior to bringing an application for federal habeas corpus, a prisoner must exhaust state administrative remedies and then state judicial remedies through all available appeals, a very significant period of time might elapse before the prisoner could ever get into federal court. By that time, no matter how swift and efficient federal habeas corpus relief might be, the prisoner might well have suffered irreparable injury and his grievances might no longer be remediable.

It is true that exhaustion of state remedies takes time. But there is no reason to assume that state prison administrators or state courts will not act expeditiously. Indeed, new regulations established by the New York Department of Correctional Services provide for administrative review of a prisoner's record in the institution shortly before the *earliest* possible release date, 7 N. Y. Codes, Rules & Regulations § 261.3 (b),[11] and, as previously noted, state judges in New York actually sit in the institutions to hear prisoner complaints. Moreover, once a state prisoner arrives in federal court with his petition for habeas corpus, the federal habeas statute provides for a swift, flexible, and summary determination of his claim. 28 U. S. C. § 2243.[12] See also *Harris* v. *Nelson*, 394 U. S. 286 (1969); and *Hens-*

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[11] That section provides that each inmate's file "shall be considered not more than three nor less than two months before the earliest possible date he would be entitled to consideration for parole or conditional or other release if that date depends upon the amount of good behavior allowance to be granted (based upon the assumption that he has earned all good behavior allowances that can be granted)."

[12] That section provides

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

"The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

"When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

"The applicant or the person detained may, under oath, deny *ley* v. *Municipal Court, ante,* at 349–350. By contrast, the filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure. That such a proceeding, with its discovery rules and other procedural formalities, can take a significant amount of time, very frequently longer than a federal habeas corpus proceeding, is demonstrated by the respondents' actions in the present case. Although both Rodriguez and Kritsky initiated their actions before their conditional-release dates, the District Court did not reach its decisions until three and 10 months later, respectively—in both cases well after the conditional-release dates had passed. Only in Katzoff's case was there a speedy determination, and his action was not initiated until after his alleged release date.

In any event, the respondents' time argument would logically extend to a state prisoner who challenges the constitutionality of a conviction that carried a relatively

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any of the facts set forth in the return or allege any other material facts.

"The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

See also 28 U. S. C. § 2254 (e):

"If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination."

short sentence; and yet such a prisoner is clearly covered by § 2254 (b). Arguably, in either case, if the prisoner could make out a showing that, because of the time factor, his otherwise adequate state remedy would be inadequate, a federal court might entertain his habeas corpus application immediately, under § 2254 (b)'s language relating to "the existence of circumstances rendering such [state] process ineffective to protect the rights of the prisoner." But we need not reach that issue here.

Principles of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings. 28 U. S. C. § 2254 (d). See *Salinger* v. *Loisel,* 265 U. S. 224, 230 (1924). Hence, a state prisoner in the respondents' situation who has been denied relief in the state courts is not precluded from seeking habeas relief on the same claims in federal court. On the other hand, *res judicata* has been held to be fully applicable to a civil rights action brought under § 1983. *Coogan* v. *Cincinnati Bar Assn.,* 431 F. 2d 1209, 1211 (CA6 1970); *Jenson* v. *Olson,* 353 F. 2d 825 (CA8 1965); *Rhodes* v. *Meyer,* 334 F. 2d 709, 716 (CA8 1964); *Goss* v. *Illinois,* 312 F. 2d 257 (CA7 1963). Accordingly, there would be an inevitable incentive for a state prisoner to proceed at once in federal court by way of a civil rights action, lest he lose his right to do so. This would have the unfortunate dual effect of denying the state prison administration and the state courts the opportunity to correct the errors committed in the State's own prisons, and of isolating those bodies from an understanding of and hospitality to the federal claims of state prisoners in situations such as those before us.[13] Federal habeas corpus, on the other hand, serves the important function of allowing the State to deal with these peculiarly local problems on its own, while preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress.

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[13] This isolation, of course, will not occur if the prisoner is required to proceed by way of federal habeas corpus, with its exhaustion requirement. For "exhaustion preserves the role of the state courts in the application and enforcement of federal law: Early federal intervention in state . . . proceedings would tend to remove

The respondents place a great deal of reliance on our recent decisions upholding the right of state prisoners to bring federal civil rights actions to challenge the conditions of their confinement. *Cooper* v. *Pate,* 378 U. S. 546 (1964); *Houghton* v. *Shafer,* 392 U. S. 639 (1968); *Wilwording* v. *Swenson,* 404 U. S. 249 (1971); *Haines* v. *Kerner,* 404 U. S. 519 (1972). But none of the state prisoners in those cases was challenging the fact or duration of his physical confinement itself, and none was seeking immediate release or a speedier release from that confinement—the heart of habeas corpus. In *Cooper,* the prisoner alleged that, solely because of his religious beliefs, he had been denied permission to purchase certain religious publications and had been denied other privileges enjoyed by his fellow prisoners. In *Houghton,* the prisoner's contention was that prison authorities had violated the Constitution by confiscating legal materials which he had acquired for pursuing his appeal, but which, in violation of prison rules, had been found in the possession of another prisoner. In *Wilwording,* the prisoners' complaints related solely to their living conditions and disciplinary measures while confined in maximum security. And in *Haines,* the prisoner claimed that prison officials had acted unconstitutionally by placing him in solitary confinement as a disciplinary measure, and he sought damages for claimed physical injuries sustained while so segregated. It is clear, then, that in

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federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests." Note, Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970).

all those cases, the prisoners' claims related solely to the States' alleged unconstitutional treatment of them while in confinement. None sought, as did the respondents here, to challenge the very fact or duration of the confinement itself. Those cases, therefore, merely establish that a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody. Upon that understanding, we reaffirm those holdings. Cf. *Humphrey* v. *Cady,* 405 U. S., at 516–517, n. 18.[14]

This is not to say that habeas corpus may not also be available to challenge such prison conditions. See *Johnson* v. *Avery,* 393 U. S. 483 (1969); *Wilwording* v. *Swenson, supra,* at 251. When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal. See Note, Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1084 (1970).[15]

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[14] If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under § 1983, his claim relating to the conditions of his confinement.

[15] The parties disagree as to the original reason for the emergence of concurrent federal remedies in prison condition cases. According to the petitioners, the parallel development reflects the fact that prior to the Court's decisions in *Jones* v. *Cunningham,* 371 U. S. 236 (1963), *Carafas* v. *LaVallee,* 391 U. S. 234 (1968), and *Johnson* v. *Avery,* 393 U. S. 483 (1969), the limits of the concept of custody for purposes of habeas corpus were uncertain, and so the clearest remedy for prisoners challenging their conditions was through a civil rights action. The respondents take the converse position—that habeas corpus may originally have been made available for these challenges because there was no other remedy for in-prison abuses before the resurrection of

But we need not in this case explore the appropriate limits of habeas corpus as an alternative remedy to a proper action under § 1983. That question is not before us. What is involved here is the extent to which § 1983 is a permissible alternative to the traditional remedy of habeas corpus. Upon that question, we hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Accordingly, we reverse the judgment before us.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The question presented by this case is one that I, like the Court of Appeals, had thought already resolved by our decision last Term in *Wilwording* v. *Swenson*, 404 U. S. 249 (1971). We held there that the Ku Klux Klan Act of 1871,[1] 42 U. S. C. § 1983; 28 U. S. C. § 1343 (3), confers jurisdiction on the United States District Courts to entertain a state prisoner's application for injunctive relief against allegedly unconstitutional conditions of confinement. See also *Humphrey* v. *Cady*, 405 U. S. 504, 516–517, n. 18 (1972); *Houghton* v. *Shafer*, 392 U. S. 639 (1968). At the same time, we held that "[t]he remedy provided by these Acts 'is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Damico* v. *California*,

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§ 1983 in *Monroe* v. *Pape*, *supra*, and the affirmation of its availability for prisoners in *Cooper* v. *Pate*, 378 U. S. 546 (1964), and *Houghton* v. *Shafer*, 392 U. S. 639 (1968).

[1] Act of April 20, 1871, c. 22, § 1, 17 Stat. 13, Rev. Stat. § 1979.

389 U. S. 416 (1967). State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." *Wilwording* v. *Swenson, supra,* at 251.

Regrettably, the Court today eviscerates that proposition by drawing a distinction that is both analytically unsound and, I fear, unworkable in practice. The net effect of the distinction is to preclude respondents from maintaining these actions under § 1983, leaving a petition for writ of habeas corpus the only available federal remedy. As a result, respondents must exhaust state remedies before their claims can be heard in a federal district court. I remain committed to the principles set forth in *Wilwording* v. *Swenson,* and I therefore respectfully dissent.

Respondents are three New York state prisoners who were placed in segregation and deprived of good-conduct-time credits as a result of prison disciplinary proceedings.[2] Each of the respondents commenced a *pro se*

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[2] In his complaint, respondent Rodriguez alleged that correctional authorities had unlawfully canceled four months and 14 days of good-conduct-time credits, "[w]ithout affording plaintiff notice of any charges or a fair hearing at which plaintiff would have the assistance of counsel and the opportunity to confront witnesses, present evidence on his own behalf; and a specification of the grounds and underlying facts upon which the [authorities'] determination was based." App. 12a. And, further, that the cancellation was an act of harassment and persecution against him because of his failure to provide the authorities with certain information. *Id.,* at 13a.

Respondent Katzoff alleged that he was wrongfully placed in solitary confinement and deprived of good-conduct time as punishment for certain entries he had made in his diary. According to an affidavit he filed in District Court, the entries in question included a reference to one prison official as "a cigar-smoking S. O. B.," and to another as a "creep." App. 54a.

Respondent Kritsky stated in his complaint that correctional authorities had deprived him of good-time credits without notice of charges or a fair hearing, and as part of a "program of harassment action in the United States District Court for the Northern District of New York by filing a combined civil rights complaint and petition for habeas corpus. In each case the District Court concluded that since the action was properly brought under § 1983, the prisoner was not bound by the exhaustion-of-state-remedies requirement of the federal habeas corpus statute.[3] On the merits of the three cases, the District Court held that state correctional authorities had deprived each respondent of rights guaranteed by the Fourteenth Amendment, and directed petitioner, the Commissioner of Correction, to restore the good-conduct-time credits that each of the respondents had lost.

By divided vote, two separate panels of the United States Court of Appeals for the Second Circuit reversed the judgments of the District Court with respect to respondents Rodriguez and Katzoff. Prior to decision in the case of respondent Kritsky, the Court of Appeals vacated the two earlier decisions and set all three cases for rehearing *en banc*. By a vote of 9–3, the Court affirmed the judgments of the District Court "upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*," decided by this Court while rehearing *en banc* was pending in the Court of Appeals. 456 F. 2d 79, 80 (1972). Although several of the judges who concurred in the decision candidly stated their mis-

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and oppression directed at the plaintiff for having participated in a peaceful and non-violent work strike which ultimately culminated in legislation being passed . . . ." App. 100a.

[3] Title 28 U. S. C. § 2254 (b) provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

givings about our holding in *Wilwording,* they felt "constrained," nonetheless, "to concur in affirming the orders of the district court." 456 F. 2d, at 81 (Friendly, C. J., concurring).[4]

The Court's conclusion that *Wilwording* is not controlling is assertedly justified by invocation of a concept, newly invented by the Court today, variously termed the "core of habeas corpus," the "heart of habeas corpus," and the "essence of habeas corpus." *Ante,* at 489, 498, and 484. In the Court's view, an action lying at the "core of habeas corpus" is one that "goes directly to the constitutionality of [the prisoner's] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." *Id.,* at 489. With regard to such actions, habeas corpus is now considered the prisoner's exclusive remedy. In short, the Court does not graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act, but it reaches what is functionally the same result by holding that the District Court's jurisdiction under the Act is in some instances displaced by the habeas corpus remedy. Henceforth, in such cases a prisoner brings an action in the nature of habeas corpus—or he brings no federal court action at all.

At bottom, the Court's holding today rests on an understandable apprehension that the no-exhaustion rule of § 1983 might, in the absence of some limitation, devour the exhaustion rule of the habeas corpus statute. The problem arises because the two statutes necessarily overlap. Indeed, every application by a state prisoner for federal habeas corpus relief against his jailers could, as a matter of logic and semantics, be viewed as an action under the Ku Klux Klan Act to obtain injunctive relief against "the deprivation," by one acting under color of state law, "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U. S. C. § 1983. To prevent state prisoners from nullifying the habeas corpus exhaustion requirement by invariably styling their petitions as pleas for relief under § 1983, the Court today devises an ungainly and irrational scheme that permits some prisoners to sue under § 1983, while others may proceed only by way of petition for habeas corpus. And the entire scheme operates in defiance of the purposes underlying both the exhaustion requirement of habeas corpus and the absence of a comparable requirement under § 1983.

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[4] Indeed, Chief Judge Friendly suggested that the "proper course for the *in banc* court [would be] to affirm the orders of the district court without writing opinions." 456 F. 2d 79, 80. Judge Kaufman, who expressed no misgivings about our holding in *Wilwording* v. *Swenson,* 404 U. S. 249 (1971), indicated in his concurring opinion that he, too, thought the judgments of the District Court should have been summarily affirmed. *Id.,* at 82.

I

At the outset, it is important to consider the nature of the line that the Court has drawn. The Court holds today that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Ante,* at 500. But, even under the Court's approach, there are undoubtedly some instances where a prisoner has the option of proceeding either by petition for habeas corpus or by suit under § 1983.

In *Johnson* v. *Avery,* 393 U. S. 483 (1969), we held that the writ of habeas corpus could be used to challenge allegedly unconstitutional conditions of confinement. Cf. *Ex parte Hull,* 312 U. S. 546, 549 (1941). And in *Wilwording* v. *Swenson, supra,* where the petitioners challenged "only their living conditions and disciplinary measures while confined in maximum security at Missouri State Penitentiary," *id.*, at 249, we held explicitly that their claims were cognizable in habeas corpus. These holdings illustrate the general proposition that "[a]ny unlawful restraint of personal liberty may be inquired into on habeas corpus. . . . This rule applies although a person is in lawful custody. His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions." *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (CA6 1944); cf. *In re Bonner*, 151 U. S. 242 (1894).[5]

Yet even though a prisoner may challenge the conditions of his confinement by petition for writ of habeas corpus, he is not precluded by today's opinion from raising the same or similar claim, without exhaustion of state remedies, by suit under the Ku Klux Klan Act, provided he attacks only the conditions of his confinement and not its fact or duration. To that extent, at least, the Court leaves unimpaired our holdings in *Wilwording* v. *Swenson*, *supra*, and the other cases in which we have upheld the right of prisoners to sue their jailers under § 1983 without exhaustion of state remedies.[6] *Humphrey* v. *Cady*, 405 U. S., at 516–517, n. 18; *Houghton* v. *Shafer*, 392 U. S. 639 (1968).[7] Nor do I read today's opinion as rejecting, or even questioning, the rationale of numerous lower court decisions authorizing challenges to prison conditions by suit under § 1983.[8] Accordingly, one can only conclude that some instances remain where habeas corpus provides a supplementary but not an exclusive remedy—or, to put it another way, where an action may properly be brought in habeas corpus, even though it is somehow sufficiently distant from the "core of habeas corpus" to avoid displacing concurrent jurisdiction under the Ku Klux Klan Act. In such a case, a state prisoner retains the option of forgoing the habeas corpus remedy in favor of suit under § 1983.

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[5] See Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1079–1087 (1970).

[6] Indeed, the Court expressly views our prior cases as establishing "that a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody. Upon that understanding, we reaffirm those holdings." *Ante*, at 499.

[7] In addition to the cases cited in text, in which we explicitly indicated that a prisoner might proceed under § 1983 without exhausting state remedies, we have also repeatedly upheld a prisoner's right to challenge the conditions of his confinement under § 1983, without any suggestion that exhaustion of state remedies is a necessary precondition to the bringing of the suit. See *Haines* v. *Kerner*, 404

II

Putting momentarily to one side the grave analytic shortcomings of the Court's approach, it seems clear that the scheme's unmanageability is sufficient reason to condemn it. For the unfortunate but inevitable legacy of today's opinion is a perplexing set of uncertainties and anomalies. And the nub of the problem is the definition of the Court's new-found and essentially ethereal concept, the "core of habeas corpus." [9]

U. S. 519 (1972); *Cruz* v. *Beto,* 405 U. S. 319 (1972); *Younger* v. *Gilmore,* 404 U. S. 15 (1971); *Cruz* v. *Hauck,* 404 U. S. 59 (1971); *McDonald* v. *Board of Election,* 394 U. S. 802 (1969); *Lee* v. *Washington,* 390 U. S. 333 (1968); *Cooper* v. *Pate,* 378 U. S. 546 (1964).

[8] See, *e. g., Sostre* v. *McGinnis,* 442 F. 2d 178, 182 (CA2 1971) (conditions of segregated confinement); *Jackson* v. *Bishop,* 404 F. 2d 571 (CA8 1968) (cruel and unusual punishment); *Hirons* v. *Director,* 351 F. 2d 613 (CA4 1965) (medical treatment); *Pierce* v. *LaVallee,* 293 F. 2d 233 (CA2 1961) (religious freedom); *Edwards* v. *Schmidt,* 321 F. Supp. 68 (WD Wis. 1971) (transfer of juveniles to adult facility); *Hancock* v. *Avery,* 301 F. Supp. 786 (MD Tenn. 1969) (solitary confinement).

[9] Indeed, one must inevitably wonder whether the "core" of habeas corpus will not prove as intractable to definition as the "core" of

A prisoner is unlucky enough to have his action fall within the core of habeas corpus whenever he challenges the fact or duration of his confinement. For example, an attack on the validity of conviction or sentence is plainly directed at the fact or duration of confinement, and the prisoner can therefore proceed only by petition for habeas corpus. Similarly, where prisoners allege, as here, that "the deprivation of their good-conduct-time credits [is] causing or [will] cause them to be in illegal physical confinement, *i. e.*, that once their conditional-release date [has] passed, any further detention of them in prison [will be] unlawful," their claim falls within the core. And "[e]ven if the restoration of the respondents' credits would not have resulted in their immediate release, but only in shortening the length of their actual confinement in prison," jurisdiction under § 1983 is displaced by the habeas corpus remedy. *Ante,* at 487.

At the opposite end of the spectrum from an attack on the conviction itself or on the deprivation of good-time credits is a prisoner's action for monetary damages against his jailers. "If a state prisoner is seeking damages," the Court makes clear, he is seeking "something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under [§ 1983] in federal court without any requirement of prior exhaustion of state remedies." *Ante,* at 494 (emphasis in original).

Between a suit for damages and an attack on the conviction itself or on the deprivation of good-time credits

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another concept that some of us have struggled to define. Cf. *Jacobellis* v. *Ohio,* 378 U. S. 184, 197 (1964) (STEWART, J., concurring).

are cases where habeas corpus is an appropriate and available remedy, but where the action falls outside the "core of habeas corpus" because the attack is directed at the conditions of confinement, not at its fact or duration. Notwithstanding today's decision, a prisoner may challenge, by suit under § 1983, prison living conditions and disciplinary measures,[10] or confiscation of legal materials,[11] or impairment of the right to free exercise of religion,[12] even though federal habeas corpus is available as an alternative remedy. It should be plain enough that serious difficulties will arise whenever a prisoner seeks to attack in a single proceeding both the conditions of his confinement and the deprivation of good-time credits. And the addition of a plea for monetary damages exacerbates the problem.

If a prisoner's sole claim is that he was placed in solitary confinement pursuant to an unconstitutional disciplinary procedure,[13] he can obtain federal injunctive relief and monetary damages in an action under § 1983. The unanswered question is whether he loses the right to proceed under § 1983 if, as punishment for his alleged misconduct, his jailers have not only subjected him to unlawful segregation and thereby inflicted an injury that is compensable in damages, but have compounded the wrong by improperly depriving him of good-time credits. Three different approaches are possible.

First, we might conclude that jurisdiction under § 1983 is lost whenever good-time credits are involved, even where the action is based primarily on the need for monetary relief or an injunction against continued segregation. If that is the logic of the Court's opinion, then the scheme creates an undeniable, and in all likelihood irresistible, incentive for state prison officials to defeat the jurisdiction of the federal courts by adding the deprivation of good-time credits to whatever other punishment is imposed. And if all of the federal claims must be held in abeyance pending exhaustion of state remedies, a prisoner's subsequent effort to assert a damages claim under § 1983 might arguably be barred by principles of res judicata.[14] To avoid the loss of his damages claim, a prisoner might conclude that he should make no mention of the good-time issue and instead seek only damages in a § 1983 action. That approach (assuming it would not be disallowed as a subterfuge to circumvent the exhaustion requirement) creates its own distressing possibilities. For, having obtained decision in federal court on the issue of damages, the prisoner would presumably be required to repair to state court in search of his lost good-time credits, returning once again to federal court if his state court efforts should prove unavailing.

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[10] *E. g., Wilwording* v. *Swenson,* 404 U. S. 249 (1971).

[11] *E. g., Houghton* v. *Shafer,* 392 U. S. 639 (1968).

[12] *E. g., Cooper* v. *Pate,* 378 U. S. 546 (1964).

[13] *E. g., Haines* v. *Kerner,* 404 U. S. 519 (1972).

Moreover, a determination that no federal claim can be raised where good-time credits are at stake would give rise to a further anomaly. If the prisoner is confined in an institution that does not offer good-time credits, and therefore cannot withdraw them,[15] his prison-conditions claims could always be raised in a suit under § 1983. On the other hand, an inmate in an institution that uses good-time credits as reward and punishment, who seeks a federal hearing on the identical legal and factual claims, would normally be required to exhaust state remedies and then proceed by way of federal habeas corpus. The rationality of that difference in treatment is certainly obscure. Yet that is the price of permitting the availability of a federal forum to be controlled by the happenstance (or stratagem) that good-time credits are at stake.

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[14] That assumes, of course, that a damages claim cannot be raised on habeas corpus, *ante,* at 494, and that the special res judicata rules of habeas corpus would not apply. In any case, we have never held that the doctrine of res judicata applies, in whole or in part, to bar the relitigation under § 1983 of questions that might have been raised, but were not, or that were raised and considered in state court proceedings. The Court correctly notes that a number of lower courts have assumed that the doctrine of res judicata is fully applicable to cases brought under § 1983. But in view of the purposes underlying enactment of the Act—in particular, the congressional misgivings about the ability and inclination of state courts to enforce federally protected rights, see *infra,* at 515–518—that conclusion may well be in error.

[15] Brief for Respondents 25, citing N. Y. Penal Law § 75.00 and N. Y. Correc. Law §§ 803, 804 (reformatory-sentenced prisoners).

As an alternative, we might reject outright the premises of the first approach and conclude that a plea for money damages or for an injunction against continued segregation is sufficient to bring all related claims, including the question of good-time credits, under the umbrella of § 1983. That approach would, of course, simplify matters considerably. And it would make unnecessary the fractionation of the prisoner's claims into a number of different issues to be resolved in duplicative proceedings in state and federal courts. Nevertheless, the approach would seem to afford a convenient means of sidestepping the basic thrust of the Court's opinion, and we could surely expect state prisoners routinely to add to their other claims a plea for monetary relief. So long as the prisoner could formulate at least a colorable damages claim, he would be entitled to litigate all issues in federal court without first exhausting state remedies.

In any event, the Court today rejects, perhaps for the reasons suggested above, both of the foregoing positions. Instead, it holds that insofar as a prisoner's claim relates to good-time credits, he is required to exhaust state remedies; but he is not precluded from simultaneously litigating in federal court, under § 1983, his claim for monetary damages or an injunction against continued segregation. *Ante,* at 499 n. 14. Under that approach, state correctional authorities have no added incentive to withdraw good-time credits, since that action cannot, standing alone, keep the prisoner out of federal court. And, at the same time, it does not encourage a prisoner to assert an unnecessary claim for damages or injunctive relief as a means of bringing his good-time claim under the purview of § 1983. Nevertheless, this approach entails substantial difficulties—perhaps the greatest difficulties of the three. In the first place, its extreme inefficiency is readily apparent. For in many instances a prisoner's claims will be under simultaneous consideration in two distinct forums, even though the identical legal and factual questions are involved in both proceedings. Thus, if a prisoner's punishment for some alleged misconduct is both a term in solitary and the deprivation of good-time credits, and if he believes that the punishment was imposed pursuant to unconstitutional disciplinary procedures, he can now litigate the legality of those procedures simultaneously in state court (where he seeks restoration of good-time credits) and in federal court (where he seeks damages or an injunction against continued segregation). Moreover, if the federal court is the first to reach decision, and if that court concludes that the procedures are, in fact, unlawful, then the entire state proceeding must be immediately aborted, even though the state court may have devoted substantial time and effort to its consideration of the case. By the same token, if traditional principles of res judicata are applicable to suits under § 1983, see *supra,* at 509 n. 14, the prior conclusion of the state court suit would effectively set at naught the entire federal court proceeding. This is plainly a curious prescription for improving relations between state and federal courts.

Since some of the ramifications of this new approach are still unclear, the unfortunate outcome of today's decision—an outcome that might not be immediately surmised from the seeming simplicity of the basic concept, the "core of habeas corpus"—is almost certain to be the further complication of prison-conditions litigation. In itself that is disquieting enough. But it is especially distressing that the remaining questions will have to be resolved on the basis of pleadings, whether in habeas corpus or suit under § 1983, submitted by state prisoners, who will often have to cope with these questions without even minimal assistance of counsel.

III

The Court's conclusion that respondents must proceed by petition for habeas corpus is unfortunate, not only because of the uncertainties and practical difficulties to which the conclusion necessarily gives rise, but also because it derives from a faulty analytic foundation. The text of § 1983 carries no explanation for today's decision; prisoners are still, I assume, "persons" within the meaning of the statute. Moreover, prior to our recent decisions expanding the definition of "custody,"[16] and abandoning the "prematurity" doctrine,[17] it is doubtful that habeas corpus would even have provided them a remedy. Since their claims could not, in all likelihood, have been heard on habeas corpus at the time the present habeas corpus statute was enacted in 1867,[18] or at the time the exhaustion doctrine was first announced in *Ex parte Royall,* 117 U. S. 241 (1886), or at the time the requirement was codified in 1948,[19] it is surely hard to view these acts as a determination to preclude suit under § 1983 and leave habeas corpus the prisoner's only remedy. Nevertheless, to prevent state prisoners from invoking the jurisdictional grant of § 1983 as a means of circumventing the exhaustion requirement of the habeas corpus statute, the Court finds it necessary to hold today that in this one instance jurisdiction under § 1983 is displaced by the habeas corpus remedy.

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[16] See, *e. g., Hensley* v. *Municipal Court, ante,* p. 345; *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Jones* v. *Cunningham,* 371 U. S. 236 (1963). These decisions have established habeas corpus as an available and appropriate remedy in situations where the petitioner's challenge is not merely to the fact of his confinement.

[17] See *Peyton* v. *Rowe,* 391 U. S. 54 (1968), overruling *McNally* v. *Hill,* 293 U. S. 131 (1934). Under the prematurity doctrine, a prisoner could not have attacked the deprivation of good-conduct-time credits where restoration of the credits would shorten the length of his confinement but not bring it immediately to an end.

[18] Act of Feb. 5, 1867, c. 28, § 1, 14 Stat. 385, now 28 U. S. C. § 2241 (c)(3). Prior to that enactment, the writ was made available to

The concern that § 1983 not be used to nullify the habeas corpus exhaustion doctrine is, of course, legitimate. But our effort to preserve the integrity of the doctrine must rest on an understanding of the purposes that underlie it. In my view, the Court misapprehends these fundamental purposes and compounds the problem by paying insufficient attention to the reasons why exhaustion of state remedies is not required in suits under § 1983. As a result, the Court mistakenly concludes that allowing suit under § 1983 would jeopardize the purposes of the exhaustion rule.

By enactment of the Ku Klux Klan Act in 1871, and again by the grant in 1875 of original federal-question jurisdiction to the federal courts,[20] Congress recognized important interests in permitting a plaintiff to choose a federal forum in cases arising under

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special categories of state prisoners. Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1048 n. 46 (1970).

[19] Act of June 25, 1948, c. 646, 62 Stat. 967, now 28 U. S. C. § 2254 (b), (c). It is agreed that the purpose of the 1948 enactment was to codify the doctrine as formulated in *Ex parte Hawk,* 321 U. S. 114 (1944), and other decisions of this Court.

[20] Act of Mar. 3, 1875, c. 137, § 1, 18 Stat. 470, now 28 U. S. C. § 1331.

federal law. "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ,' *Robb* v. *Connolly,* 111 U. S. 624, 637." *Zwickler* v. *Koota,* 389 U. S. 241, 248 (1967).

This grant of jurisdiction was designed to preserve and enhance the expertise of federal courts in applying federal law; to achieve greater uniformity of results, cf. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 347–348 (1816); and, since federal courts are "more likely to apply federal law sympathetically and understandingly than are state courts," ALI, Study of the Division of Jurisdiction Between State and Federal Courts 166 (1969), to minimize misapplications of federal law. See generally *id.,* at 165–167.

In the service of the same interests, we have taken care to emphasize that there are

> "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has

> by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 40." *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 415 (1964).

We have also recognized that review by this Court of state decisions, "even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts." *Id.,* at 416. The federal courts are, in short, the "primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." F. Frankfurter & J. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1928). See *England* v. *Louisiana State Board of Medical Examiners, supra,* at 415.

These considerations, applicable generally in cases arising under federal law, have special force in the context of the Ku Klux Klan Act of 1871. In a suit to enforce fundamental constitutional rights, the plaintiff's choice of a federal forum has singular urgency.[21] The statutory predecessor to § 1983 was, after all, designed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape,* 365

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[21] See generally Chevigny, Section 1983 Jurisdiction: A Reply, 83 Harv. L. Rev. 1352, 1356–1358 (1970).

U. S. 167, 180 (1961). And the statute's legislative history

> "makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' *Ex parte Virginia* [100 U. S. 339, 346 (1880)]." *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972).

See also *District of Columbia* v. *Carter*, 409 U. S. 418, 426–428 (1973).[22]

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[22] See, *e. g.*, remarks of Rep. Coburn:

"The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily." Cong. Globe, 42d Cong., 1st Sess., 460 (1871).

And the remarks of Sen. Pratt:

"[O]f the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples." *Id.*, at 505.

It is against this background that we have refused to require exhaustion of state remedies by civil rights plaintiffs.[23] Plainly, "[w]e would defeat [the purposes of § 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." *McNeese* v. *Board of Education,* 373 U. S. 668, 672 (1963). "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." *Stapleton* v. *Mitchell,* 60 F. Supp. 51, 55 (Kan. 1945); quoted with approval in *Zwickler* v. *Koota,* 389 U. S., at 248; and *McNeese* v. *Board of Education, supra,* at 674 n. 6. See also *Monroe* v. *Pape, supra,* at 183; *Moreno* v. *Henckel,* 431 F. 2d 1299, 1303–1307 (CA5 1970); H. Friendly, Federal Jurisdiction: A General View 102–103 (1973).

Our determination that principles of federalism do not require the exhaustion of state remedies in cases brought under the Ku Klux Klan Act holds true even where the state agency or process under constitutional attack is intimately tied to the state judicial machinery. Cf. *Lynch* v. *Household Finance Corp.,* 405 U. S. 538 (1972). Indeed, only last Term we held in *Mitchum* v. *Foster, supra,* that § 1983 operates as an exception to the federal anti-injunction statute, 28 U. S. C. § 2283, which prohibits federal court injunctions against ongoing state judicial proceedings and which is designed to prevent

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[23] See, *e. g., Wilwording* v. *Swenson, supra; King* v. *Smith,* 392 U. S. 309, 312 n. 4 (1968); *Monroe* v. *Pape,* 365 U. S. 167 (1961); *Bacon* v. *Rutland R. Co.,* 232 U. S. 134 (1914); cf. Note, Exhaustion of State Remedies Under the Civil Rights Act, 68 Col. L. Rev. 1201 (1968).

"needless friction between state and federal courts." *Oklahoma Packing Co.* v. *Gas Co.,* 309 U. S. 4, 9 (1940). Although the anti-injunction statute rests in part on considerations as fundamental as the "constitutional independence of the States and their courts," *Atlantic C. L. R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281, 287 (1970), and although exceptions will "not be enlarged by loose statutory construction," *ibid.,* we nevertheless unanimously concluded that § 1983 is excepted from the statute's prohibition—that the anti-injunction statute does not, in other words, displace federal jurisdiction under the Ku Klux Klan Act.

In sum, the absence of an exhaustion requirement in § 1983 is not an accident of history or the result of careless oversight by Congress or this Court. On the contrary, the no-exhaustion rule is an integral feature of the statutory scheme. Exhaustion of state remedies is not required precisely because such a requirement would jeopardize the purposes of the Act. For that reason, the imposition of such a requirement, even if done indirectly by means of a determination that jurisdiction under § 1983 is displaced by an alternative remedial device, must be justified by a clear statement of congressional intent, or, at the very least, by the presence of the most persuasive considerations of policy. In my view, no such justification can be found.

Crucial to the Court's analysis of the case before us is its understanding of the purposes that underlie the habeas corpus exhaustion requirement. But just as the Court pays too little attention to the reasons for a no-exhaustion rule in actions under § 1983, it also misconceives the purposes of the exhaustion requirement in habeas corpus. As a result, the Court reaches what seems to me the erroneous conclusion that the purposes of the exhaustion requirement are fully implicated in respondents' actions, even though respondents sought to bring these actions under § 1983.

"The rule of exhaustion in federal habeas corpus actions is," according to today's opinion, "rooted in considerations of federal-state comity. That principle was defined in *Younger* v. *Harris,* 401 U. S. 37, 44 (1971), as 'a proper respect for state functions,' and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Ante,* at 491. Moreover, the Court reasons that since the relationship between state prisoners and state officers is especially intimate, and since prison issues are peculiarly within state authority and expertise, "the States have an important interest in not being bypassed in the correction of those problems." *Ante,* at 492. With all respect, I cannot accept either the premises or the reasoning that lead to the Court's conclusion.

Although codified in the habeas corpus statute in 1948, 28 U. S. C. § 2254 (b), the exhaustion requirement is a "judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.' *Secretary of State for Home Affairs* v. *O'Brien,* [1923] A. C. 603, 609 (H. L.)." *Braden* v. *30th Judicial Circuit,* 410 U. S. 484, 490 (1973). The indisputable concern of all our decisions concerning the doctrine has been the relationship "between the *judicial tribunals* of the Union and of the States . . . . [T]he public good requires that those relations be not disturbed by unnecessary conflict between *courts* equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall,* 117 U. S., at 251 (emphasis added). *Ex parte Royall* is, of course, the germinal case, and its concern with the relations between state and federal *courts* is mirrored in our subsequent decisions. See, *e. g., Braden* v. *30th Judicial Circuit, supra,* at 489–490; *Baker* v. *Grice,* 169 U. S. 284, 291 (1898); *Ex parte Hawk,* 321 U. S. 114, 116–117 (1944); cf. *Sostre* v. *McGinnis,* 442 F. 2d 178, 182 (CA2 1971); *Edwards* v. *Schmidt,* 321 F. Supp. 68, 74–75 (WD Wis. 1971). We have grounded the doctrine squarely on the view that "it would be unseemly in our dual system of government for a federal district court to upset a *state court conviction* without an opportunity to the state courts to correct a constitutional violation." *Fay* v. *Noia,* 372 U. S. 391, 419–420 (1963) (emphasis added), quoting from *Darr* v. *Burford,* 339 U. S. 200, 204 (1950). See Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 172–173 (1948).

That is not to say, however, that the purposes of the doctrine are implicated only where an attack is directed at a state court *conviction* or *sentence. Ex parte Royall* itself did not involve a challenge to a state conviction, but rather an effort to secure a prisoner's release on habeas corpus "in advance of his trial in the [state] court in which he [was] indicted." *Id.,* at 253. But there, too, the focus was on relations between the state and federal *judiciaries.* It is a fundamental purpose of the exhaustion doctrine to preserve the "orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts." Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970). Significantly, the identical interest in preserving the integrity and orderliness of judicial proceedings gives rise to the application of the exhaustion doctrine even where a federal prisoner attacks the action of a federal court. *Id.*, at 1094–1095. See, *e. g., Bowen* v. *Johnston,* 306 U. S. 19, 26–27 (1939). In such a case, considerations of federalism obviously do not come into play. Yet the exhaustion requirement is nevertheless applied in order to prevent the disruption of the orderly conduct of judicial administration.

With these considerations in mind, it becomes clear that the Court's decision does not serve the fundamental purposes behind the exhaustion doctrine. For although respondents were confined pursuant to the judgment of a state judicial tribunal, their claims do not relate to their convictions or sentences, but only to the administrative action of prison officials who subjected them to allegedly unconstitutional treatment, including the deprivation of good-time credits. This is not a case, in other words, where federal intervention would interrupt a state proceeding or jeopardize the orderly administration of state judicial business. Nor is it a case where an action in federal court might imperil the relationship between state and federal courts. The "regularity of proceedings had in courts of coordinate jurisdiction," Parker, *supra,* at 172–173, is not in any sense at issue.

To be sure, respondents do call into question the constitutional validity of action by state officials, and friction between those officials and the federal court is by no means an inconceivable result. But standing alone, that possibility is simply not enough to warrant application of an exhaustion requirement. First, while we spoke in *Younger* v. *Harris,* 401 U. S. 37, 44 (1971), of the need for federal courts to maintain a "proper respect for state functions," neither that statement nor our holding there supports the instant application of the exhaustion doctrine. Our concern in *Younger* v. *Harris* was the "longstanding public policy against federal court interference with *state court proceedings,*" *id.,* at 43 (emphasis added), by means of a federal injunction against the continuation of those proceedings. *Younger* is thus an instructive illustration of the very proposition that the Court regrettably misconstrues. It does not in any sense demand, or even counsel, today's decision.

Second, the situation that exists in the case before us—an attack on state administrative rather than judicial action—is the stereotypical situation in which relief under § 1983 is authorized. See, *e. g., McNeese* v. *Board of Education,* 373 U. S. 668 (1963) (attack on school districting scheme); *Damico* v. *California,* 389 U. S. 416 (1967) (attack on welfare requirements); *Monroe* v. *Pape,* 365 U. S., at 183 (attack on police conduct). In each of these cases the exercise of federal jurisdiction was potentially offensive to the State and its officials. In each of these cases the attack was directed at an important state function in an area in which the State has wide powers of regulation. Yet in each of these cases we explicitly held that exhaustion of state remedies was not required. And in comparable cases we have taken pains to insure that the abstention doctrine is not used to defeat the plaintiff's initial choice of a federal forum, see, *e. g., Zwickler* v. *Koota,* 389 U. S., at 249, even though the plaintiff could reserve the right to litigate the federal claim in federal court at the conclusion of the state proceeding. *England* v. *Louisiana State Board of Medical Examiners.* 375 U. S. 411 (1964). Like Judge Kaufman, who concurred in the affirmance of the cases now before us, "I cannot believe that federal jurisdiction in cases involving prisoner rights is any more offensive to the state than federal jurisdiction in the areas" where the exhaustion requirement has been explicitly ruled inapplicable. 456 F. 2d, at 82.

Third, if the Court is correct in assuming that the exhaustion requirement must be applied whenever federal jurisdiction might be a source of substantial friction with the State, then I simply do not understand why the

Court stops where it does in rolling back the district courts' jurisdiction under § 1983. Application of the exhaustion doctrine now turns on whether or not the action is directed at the fact or duration of the prisoner's confinement. It seems highly doubtful to me that a constitutional attack on prison conditions is any less disruptive of federal-state relations than an attack on prison conditions joined with a plea for restoration of good-time credits. Chief Judge Friendly expressed the view, as did the judges in dissent below, that "petitions of state prisoners complaining of the time or conditions of their confinement have the same potentialities for exacerbating federal-state relations as petitions attacking the validity of their confinement—perhaps even more." 456 F. 2d, at 80. Yet the Court holds today that exhaustion is required where a prisoner attacks the deprivation of good-time credits, but not where he challenges only the conditions of his confinement. It seems obvious to me that both of those propositions cannot be correct.

Finally, the Court's decision may have the ironic effect of turning a situation where state and federal courts are not initially in conflict into a situation where precisely such conflict does result. Since respondents' actions would neither interrupt a state judicial proceeding nor, even if successful, require the invalidation of a state judicial decision, "[t]he question is simply whether one court or another is going to decide the case." Note, Exhaustion of State Remedies Under the Civil Rights Act, 68 Col. L. Rev. 1201, 1205–1206 (1968). If we had held, consistently with our prior cases, that the plaintiff has the right to choose a federal forum, the exercise of that right would not offend or embarrass a state court with concurrent jurisdiction. Now, however, a prisoner who seeks restoration of good-time credits must proceed first in state court, although he has the option of petitioning the federal court for relief if his state suit is unsuccessful.

If the prisoner does resort to a federal habeas corpus action, the potential for friction with the State is certain to increase. The State is likely, after all, to derive little pleasure from the federal court's effort to determine whether there was "either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U. S. C. § 2254 (b). And since it is the validity of the state court's decision that is placed in issue, the State will have to endure a federal court inquiry into whether the State's factfinding process was adequate to afford a full and fair hearing, 28 U. S. C. § 2254 (d)(2), whether the petitioner was denied due process of law in the state court proceeding, *id.*, § 2254 (d) (7), and whether the state court's factual determinations were fairly supported by the record, *id.*, § 2254 (d)(8). Cf. *Townsend* v. *Sain*, 372 U. S. 293 (1963). Since none of these questions would even arise if the Court had held these actions properly brought under § 1983, it seems a good deal premature to proclaim today's decision a major victory in our continuing effort to achieve a harmonious and healthy federal-state system.

IV

In short, I see no basis for concluding that jurisdiction under § 1983 is, in this instance, pre-empted by the habeas corpus remedy. Respondents' effort to bring these suits under the provisions of the Ku Klux Klan Act should not be viewed as an attempted circumvention of the exhaustion requirement of the habeas corpus statute, for the effort does not in any sense conflict with the policies underlying that requirement.[24] By means of these suits, they demand an immediate end to action under color of state law that has the alleged effect of violating fundamental rights guaranteed by the Federal Constitution. The Ku Klux Klan Act was designed to afford an expeditious federal hearing for the resolution of precisely such claims as these. Since I share the Court's view that exhaustion of state judicial remedies is not required in any suit properly brought in federal court under § 1983, *ante,* at 477, and since I am convinced that respondents have properly invoked the jurisdictional grant of § 1983, I would affirm the judgment of the Court of Appeals.

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[24] In a case where the habeas corpus statute does provide an available and appropriate remedy, and where a prisoner's selection of an alternative remedy would undermine and effectively nullify the habeas corpus exhaustion requirement, it would, of course, be

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possible to view the suit as an impermissible attempt to circumvent that requirement. But by the same token, if a prisoner seeks to challenge only the conditions of his confinement—in which case the purposes underlying the exhaustion rule do not come into play—his filing should be considered a complaint under § 1983 even if the prisoner terms it a petition for habeas corpus. That result is consistent with the view that prisoner petitions should be liberally considered, *Price* v. *Johnston,* 334 U. S. 266 (1948), and it represents no threat to the integrity of the exhaustion doctrine. Nothing in today's decision suggests that the district courts should follow any other practice.

GEORGIA ET AL. *v.* UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 72-75. Argued February 21-22, 1973—Decided May 7, 1973

On November 5, 1971, the State of Georgia submitted to the Attorney General for consideration under § 5 of the Voting Rights Act its 1971 House reapportionment plan. Two weeks later, the Attorney General requested additional information, which was received on January 6, 1972. On March 3, the Attorney General, after citing the combination, *inter alia,* of multimember districts, majority runoff elections, and numbered posts, objected to the plan, being unable to conclude that it did not have a discriminatory racial effect on voting. The state legislature then enacted its superseding 1972 plan, which was submitted on March 15 and rejected by the Attorney General on March 24 as not overcoming previous objections. The United States brought this suit to enjoin the holding of elections under the 1972 plan after the legislature decided against a new reapportionment. A three-judge District Court held that the 1972 plan came under § 5 of the Act and issued an injunction. *Held:*

1. Georgia's 1972 reapportionment changes, which have the potential for diluting Negro voting power, are "standards, practices, or procedures with respect to voting" within the meaning of § 5 of the Voting Rights Act, cf. *Allen* v. *State Board of Elections,* 393 U. S. 544. Pp. 531-535.

2. The Attorney General, applying a permissible regulation, placed the burden on Georgia as the submitting party to prove that the plan did not have a racially discriminatory purpose or effect on voting, and the State failed to meet that burden. Pp. 536-539.

3. Georgia's claim that the Attorney General did not seasonably object to the 1971 plan may well be moot in view of his timely objection to the superseding 1972 plan, but in any event that claim lacks merit as the Attorney General's regulation that the statutory 60-day period begins to run from the time that necessary information is furnished is reasonable and comports with the Act. Pp. 539-541.

4. Elections having been conducted under the 1972 plan under this Court's stay order, new elections are not required, but future

elections under that plan will be enjoined until a plan withstanding § 5 clearance procedures is submitted. P. 541.

351 F. Supp. 444, affirmed and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the result, *post*, p. 541. WHITE, J., filed a dissenting opinion in which POWELL and REHNQUIST, JJ., joined, *post*, p. 542. POWELL, J., filed a dissenting opinion, *post*, p. 545.

Harold N. Hill, Jr., Executive Assistant Attorney General of Georgia, argued the cause for appellants. With him on the briefs were *Arthur K. Bolton*, Attorney General, and *Robert J. Castellani* and *Dorothy Y. Kirkley*, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Norman, James P. Turner, William Bradford Reynolds,* and *John C. Hoyle.*[*]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Attorney General of the United States brought this suit under § 12 (d) of the Voting Rights Act of 1965 as amended, 42 U. S. C. § 1973j (d), to enjoin the State of Georgia from conducting elections for its House of Representatives under the 1972 legislative reapportionment law. A three-judge District Court in the Northern District of Georgia agreed that certain aspects of the reapportionment law came within the ambit of § 5 of the Act, 42 U. S. C. § 1973c, and that the State, which is subject to the provisions of § 5,[1] had not obtained prior clearance from either the Attorney General or the District Court for the District of Columbia. Accordingly, and without reaching the question whether the reapportionment plan had the purpose or effect of "denying or abridging the right to vote on account of race or color," 42 U. S. C. § 1973c, the District Court issued the requested injunction.[2] The State brought this appeal. We noted probable jurisdiction, staying enforcement of the District Court judgment pending disposition of the appeal. 409 U. S. 911.

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[*] *Stephen J. Pollak, Richard M. Sharp,* and *Armand Derfner* filed a brief for the National Association for the Advancement of Colored People et al. as *amici curiae* urging affirmance.

Following the 1970 Census, the Georgia Legislature set out to reapportion its State House of Representatives, State Senate, and federal congressional electoral districts. We are here concerned only with the reapportionment plan for the State House of Representatives.[3] The result of the legislature's deliberations was a plan (hereinafter the 1971 plan) that, as compared with the prior 1968 scheme, decreased the number of districts from 118 to 105, and increased the number of multimember districts from 47 to 49. Whereas the prior apportionment plan had generally preserved county lines, the 1971 plan did not: 31 of the 49 multimember districts and 21 of the 56 single-member districts irregularly crossed county boundaries. The boundaries of nearly all districts were changed, and in many instances the number of representatives per district was altered. Residents of some 31 counties formerly in single-member districts were brought into multimember districts. Under continuing Georgia law, a candidate receiving less than a majority of the votes cast for a position was required to participate in a majority runoff election. Ga. Code Ann. § 34–1513. And in the multimember districts, each candidate was required to designate the seat for which he was running, referred to as the "numbered post." Ga. Code Ann. § 34–1015.

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[1] A State is subject to § 5 if it qualifies under § 4 (b), 42 U. S. C. § 1973b (b). Covered States are those which on November 1, 1964, employed any of several enumerated tests or devices as a prerequisite to voting, and in which less than 50% of eligible voters were registered to vote or actually voted in the November 1964 presidential election. States that meet identical criteria with respect to the 1968 presidential election are also covered under the amended Act. It is stipulated that Georgia is covered under § 4 (b).

[2] 351 F. Supp. 444, 446–447.

[3] No objection was interposed with respect to the State Senate or federal congressional districts.

Section 5 of the Voting Rights Act forbids States subject to the Act from implementing any change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," *or* submitting the plan to the Attorney General of the United States and receiving no objection within 60 days. 42 U. S. C. § 1973c. Pursuant to this requirement, the State of Georgia submitted the 1971 plan to the Attorney General on November 5, 1971. Two weeks later, a representative of the Department of Justice wrote to the State Attorney General, requesting further information needed to assess the racial impact of the tendered plan.[4] This information was received on January 6, 1972, and on March 3, 1972, the Attorney General of the United States formally objected to the State's plan. The objection letter cited the combination of multimember districts, numbered posts, majority runoff elections, and the extensive departure from the State's prior policy of adhering to county lines. On the basis of these changes, plus particular changes in the structure of potential black majority single-member districts, the Attorney General was "unable to conclude that the plan does not have a discriminatory racial effect on voting." The letter stated that the Attorney General therefore felt obligated to "interpose an objection to changes submitted by these reapportionment plans."

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[4] The Justice Department asked for census maps of the 1964 and 1968 House districts; the distribution of white and nonwhite population within the 1964, 1968, and 1971 districts; a history of the primary and general elections in which Negro candidates ran; data, including race, with respect to all elected state representatives; and the legislative history of all redistricting bills.

The State Legislature immediately enacted a new reapportionment plan and repealed its predecessor. The 1972 plan increased the number of districts from 105 to 128, and decreased the number of multimember districts from 49 to 32. Twenty-two of the multimember districts and 37 of the single-member districts still crossed county boundaries.

This 1972 plan was submitted to the Attorney General on March 15, and he objected on March 24. The Assistant Attorney General's letter stated, in part:

> "After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972, letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for the reasons enunciated in my March 3, 1972, letter I must, on behalf of the Attorney General, object to S. B. 690 reapportioning the Georgia House of Representatives."

When the Georgia Legislature resolved that it would take no further steps to enact a new plan, the Attorney General brought the present lawsuit.

The State of Georgia claims that § 5 is inapplicable to the 1972 House plan, both because the Act does not reach "reapportionment" and because the 1972 plan does not constitute a change from procedures "in force or effect on November 1, 1964." If applicable, the Act is claimed to be unconstitutional as applied. The State also challenges two aspects of the Attorney General's conduct of the § 5 objection procedure, claiming, first, that the Attorney General cannot object to a state plan without finding that it in fact has a discriminatory purpose or effect, and, second, that the Attorney General's objection to the 1971 plan was not made within the 60-day time period allowed for objection under the Act.

I

Despite the fact that multimember districts, numbered posts, and a majority runoff requirement were features of Georgia election law prior to November 1, 1964, the changes that followed from the 1972 reapportionment are plainly sufficient to invoke § 5 if that section of the Act reaches the substance of those changes. Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters. It seems clear that the extensive reorganization of voting districts and the creation of multimember districts in place of single-member districts in certain areas amounted to substantial departures from the electoral state of things under previous law. The real question is whether the substance of these changes undertaken as part of the state reapportionment are "standards, practices, or procedures with respect to voting" within the meaning of § 5.

The prior decisions of this Court compel the conclusion that changes of the sort included in Georgia's 1972 House reapportionment plan are cognizable under § 5. In *South Carolina* v. *Katzenbach,* 383 U. S. 301, we upheld the basic constitutionality of the Voting Rights Act. Mr. Justice Black dissented from that judgment to the extent that it held every part of § 5 is constitutional, precisely describing the broad sweep of § 5:

> "Section 5 goes on to provide that a State covered by § 4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color." 383 U. S., at 356 (concurring and dissenting opinion).

The applicability of § 5 to election law changes such as those enacted by Georgia in its 1972 plan was all but conclusively established by the opinion of this Court in *Allen* v. *State Board of Elections,* 393 U. S. 544. The *Allen* opinion, dealing with four companion cases, held that § 5 applied to a broad range of voting law changes, and was constitutional as applied. With respect to the reach of § 5, we held that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Id.,* at 566. One of the companion cases, *Fairley* v. *Patterson,* involved a claim that a change from district to at-large voting for county supervisor was a change in a "standard, practice, or procedure with respect to voting." The challenged procedure was held to be covered by § 5. We noted that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964)." *Id.,* at 569. In holding that § 5 reached voting law changes that threatened to dilute

Negro voting power, and in citing *Reynolds* v. *Sims,* we implicitly recognized the applicability of § 5 to similar but more sweeping election law changes arising from the reapportionment of state legislatures. 393 U. S., at 565–566, 583–586 (Harlan, J., concurring and dissenting).

Had Congress disagreed with the interpretation of § 5 in *Allen,* it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed,[5] the Act was extended for five years, without any substantive modification of § 5. Pub. L. 91–285, 84 Stat. 314, 315. We can only conclude, then, that *Allen* correctly interpreted the congressional design when it held that "the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'" 393 U. S., at 565–566.

Another measure of the decisiveness with which *Allen* controls the present case is the actual practice of covered States since the *Allen* case was decided. Georgia, for example, submitted its 1971 plan to the Attorney General because it clearly believed that plan was covered by § 5. Its submission was "made pursuant to § 5," and the State Attorney General explained in his submission that the 1968 reapportionment of the Georgia House of Representatives "was not submitted because at that time, prior to *Allen* v. *Board of Elections*, . . . it was believed to be unnecessary to submit reapportionment plans to the United States Attorney General pursuant to the Voting Rights Act of 1965." When the Attorney General objected, Georgia changed its House plan and resubmitted it pursuant to § 5. Other States covered by the Act have also read *Allen* as controlling. The brief for the United States advises us that as of December 1, 1972, 381 post-*Allen* reapportionment plans had been presented to the Attorney General by various States for § 5 approval.

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[5] See, *e. g.,* Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 4249, H. R. 5538, and Similar Proposals, 91st Cong., 1st Sess., 1, 4, 18, 83, 130–131, 133, 147–149, 154–155, 182–184, 402–454; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act of 1965, 91st Cong., 1st and 2d Sess., 48, 195–196, 369–370, 397–398, 426–427, 469. David L. Norman, then Deputy Assistant Attorney General, Civil Rights Division, testified that, "from court decisions, all these redistricting plans are going to have to be submitted to the Attorney General for his approval because they are voting changes." Senate Hearings, *supra,* at 507.

In the present posture of this case, the question is not whether the redistricting of the Georgia House, including extensive shifts from single-member to multimember districts, in fact had a racially discriminatory purpose or effect. The question, rather, is whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5. It is beyond doubt that such a potential exists, cf. *Whitcomb* v. *Chavis*, 403 U. S. 124, 141–144. In view of the teaching of *Allen*,[6] reaffirmed in *Perkins* v. *Matthews*, 400 U. S.

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[6] The appellants point to language in the *Allen* opinion that, they say, left open the question of the applicability of § 5 to a state reapportionment law. The cited passage in *Allen* is as follows:

"Appellees in No. 25 [*Fairley* v. *Patterson*] also argue that § 5 was not intended to apply to a change from district to at-large voting, because application of § 5 would cause a conflict in the administration of reapportionment legislation. They contend that under such a broad reading of § 5, enforcement of a reapportionment plan could be enjoined for failure to meet the § 5 approval requirements, even though the plan had been approved by a federal court. Appellees urge that Congress could not have intended to force the States to submit a reapportionment plan to two different courts.

"We must reject a narrow construction that appellees would give to § 5. . . .

. . . . . .

". . . The argument that some administrative problem might

379, we hold that the District Court was correct in deciding that the changes enacted in the 1972 reapportionment plan for the Georgia House of Representatives were within the ambit of § 5 of the Voting Rights Act.[7] And for the reasons stated at length in *South Carolina* v. *Katzenbach,* 383 U. S., at 308–337, we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment.

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arise in the future does not establish that Congress intended that § 5 have a narrow scope; we leave to another case a consideration of any possible conflict." 393 U. S. 544, 564–565, 569.

The caveat implicit in this language would support the appellants' position only if practical problems of administration had emerged in the period that has elapsed since *Allen* was decided. This does not appear to have been the case. The brief of the United States advises us that the Department of Justice has adopted procedures designed to minimize any conflicts between § 5 administrative review and federal court litigation based on Fourteenth or Fifteenth Amendment attacks upon state reapportionment plans. Where a reapportionment plan has been prescribed by federal judicial decree, the Attorney General does not review it. See *Connor* v. *Johnson,* 402 U. S. 690, 691. Where a plan has been submitted to the Attorney General and is at the same time being litigated with respect to a Fifteenth Amendment claim, the Attorney General has deferred to the judicial determination regarding racial discrimination. Finally, the number of instances presenting an administrative-judicial overlap has been small. Of the 381 reapportionments submitted to the Attorney General, only 19 of the objected-to submissions were involved in litigation when submitted.

[7] Georgia has argued that § 5 approval is needed only with respect to those electoral districts in which a change in a "standard, practice, or procedure with respect to voting" occurred. In an appropriate case, a State might establish that a reapportionment plan left some districts unaffected by even a minor change with the potential for diluting the value of the Negro vote. We do not decide whether Georgia could show the existence of any unaffected districts in this case, and we leave that issue for consideration by the District Court on remand.

II

By way of implementing the performance of his obligation to pass on state submissions under § 5, the Attorney General has promulgated and published in the Federal Register certain administrative regulations, 28 CFR Part 51. The appellants claim these regulations are without legislative authorization, and object in particular to the application in the present case of two regulations which set forth the standards for decision on submissions and more fully define the 60-day time period provided in the Act.

It is true, as the appellants contend, that § 5 itself does not authorize the Attorney General to promulgate any regulations. But § 5 is also silent as to the procedures the Attorney General is to employ in deciding whether or not to object to state submissions, as to the standards governing the contents of those submissions, and as to the meaning of the 60-day time period in which the Attorney General is to object, if at all. Rather than reading the statute to grant him unfettered discretion as to procedures, standards, and administration in this sensitive area, the Attorney General has chosen instead to formulate and publish objective ground rules. If these regulations are reasonable and do not conflict with the Voting Rights Act itself, then 5 U. S. C. § 301, which gives to "[t]he head of an Executive department" the power to "prescribe regulations for the government of his department, . . . [and] the distribution and performance of its business . . . ," is surely ample legislative authority for the regulations. See *United States* v. *Morehead,* 243 U. S. 607; *Smith* v. *United States,* 170 U. S. 372.

In 28 CFR § 51.19, the Attorney General has set forth the standards to be employed in deciding whether or not to object to a state submission. The regulation states that the burden of proof is on the submitting party, and that the Attorney General will refrain from objecting only if his review of the material submitted satisfies him that the proposed change does not have a racially discriminatory purpose or effect. If he is persuaded to the contrary, or if he cannot within the 60-day time period satisfy himself that the change is without a discriminatory purpose or effect, the regulation states that the Attorney General will object to the submission.[8] In objecting to the 1971 plan, the Assistant Attorney General wrote that he was "unable to conclude that the plan does not have a discriminatory racial effect on voting." The objection letter to the 1972 plan did not specify a degree of certainty as to the plan's discriminatory impact, but instead stated that the new plan had not remedied the features found objectionable in its predecessor.

Although both objections were consistent with the Attorney General's regulations, the appellants in effect attack the legitimacy of the regulation described above in contending that the Attorney General is without power to object unless he has actually found that the changes contained in a submission have a discriminatory purpose or effect.

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[8] Title 28 CFR § 51.19, in pertinent part, states that: "the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. . . . If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

In assessing this claim, it is important to focus on the entire scheme of § 5. That portion of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect. The alternative procedure of submission to the Attorney General "merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen* v. *State Board of Elections,* 393 U. S., at 549.

It is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof.[9] What the Attorney General's regulations do is to place the same burden on the submitting party in a § 5 objection procedure. Though the choice of language in the objection letter sent to the State of Georgia was not a model of precision, in the context of the promulgated regulations the letter surely notified the State with sufficient clarity that it had not sustained its burden of proving that the proposed changes were free of a racially discriminatory effect. It is not necessary to hold that this allocation of the burden of proof by the Attorney General was his only possible choice under the Act, in order to find it a reasonable means of administering his § 5 obligation. Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance. The Attorney General's choice of a proof standard was thus at least reasonable and consistent with the Act, and we hold that his objection pursuant to that standard was lawful and effective.

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[9] The very effect of § 5 was to shift the burden of proof with respect to racial discrimination in voting. Rather than requiring affected parties to bring suit to challenge every changed voting practice, States subject to § 5 were required to obtain prior clearance before proposed changes could be put into effect. The burden of proof is on "the areas seeking relief." *South Carolina* v. *Katzenbach,* 383 U. S. 301, 335.

The appellant's final contention is that the Attorney General's objection to the 1971 plan was untimely, and so the submitted plan should have been held by the District Court to have gone into effect. It is far from clear that this claim is not simply moot, since the state enactment establishing the 1972 plan explicitly repealed the 1971 plan,[10] and the objection to the 1972 plan was clearly within the statutory time period. In any event, the claim is without merit.

In promulgating regulations, the Attorney General dealt with several aspects of the 60-day time limit established by § 5 of the Act. The regulations provide that all calendar days count as part of the allotted period, that parties whose submissions are objected to may seek reconsideration on the basis of new information and obtain a ruling within 60 days of that request, and that the 60-day period shall commence from the time the Department of Justice receives a submission satisfying the enumerated requirements. 28 CFR § 51.3 (b)–(d).

In the present case, the Attorney General found the initial submission of the 1971 plan incomplete under the regulations. Two weeks after receiving it, he requested additional information.[11] His letter referred to 28 CFR

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[10] See Ga. Senate Bill 690, Mar. 9, 1972.

[11] The letter sent to the Attorney General of Georgia stated that a "preliminary examination" of the materials submitted led the Department of Justice to conclude "that the data sent to the Attorney General are insufficient to evaluate properly the changes you have submitted. In accordance with Sections 51.10 (a)(6) and 51.18 (a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 . . . would you please assist us by providing this Department the following additional information: . . . ."

The promulgated regulations define in 28 CFR § 51.10 the contents of a submission. Section 51.10 (a)(6) states:

"With respect to redistricting, annexation, and other complex

§ 51.18, a regulation providing for a request for additional information, and noted the additional regulatory provision that the 60-day period would not commence until the information was received. The State did not submit the requested data until January 6, 1972. Under the above-mentioned regulation the 60-day period commenced on that date, and the Department of Justice made its objection within 60 days—on March 3.

The appellants argue that the Attorney General has granted himself more time than the statute provides by promulgating regulations suspending the time period until a complete submission is received. Here again, the question is whether the regulation is a reasonable administrative effectuation of § 5 of the Act. The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information. There is no serious claim in this case that the additional information requested was unnecessary or irrelevant to § 5 evaluation of the submitted reapportionment plan.[12] Yet, if the Attorney General were denied the power to suspend the 60-day period until a complete submission were tendered, his only plausible response to an inadequate or incomplete submission would be simply to object to it. He would then leave it to the State to submit adequate

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changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18 (a)."

Section 51.10 (b) "strongly urges" submitting authorities to produce the information enumerated to the extent it is available and relevant to the submitted changes. Virtually all of the information requested in this case, see n. 4, *supra*, falls within the enumerated categories of § 51.10 (b).

[12] See n. 4, *supra*.

information if it wished to take advantage of this means of clearance under § 5. This result would only add acrimony to the administration of § 5. We conclude, therefore, that this facet of the Attorney General's regulations is wholly reasonable and consistent with the Act.[13]

III

For the foregoing reasons, the judgment of the District Court is affirmed. Since, however, elections were conducted under the disputed 1972 plan by reason of this Court's stay order, it would be inequitable to require new elections at this time.

The case is remanded to the District Court with instructions that any future elections under the Georgia House reapportionment plan be enjoined unless and until the State, pursuant to § 5 of the Voting Rights Act, tenders to the Attorney General a plan to which he does not object, or obtains a favorable declaratory judgment from the District Court for the District of Columbia.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring in the result.

I concur in the result reached by the Court but I do so under the mandate of *Allen* v. *State Board of Elections,*

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[13] The appellants contend that to allow the Attorney General to promulgate this regulation is to open the way to frivolous and repeated delays by the Justice Department of laws of vital concern to the covered States. No such conduct by the Attorney General is presented here, and by upholding the basic validity of the regulation we most assuredly do not prejudge any case in which such unwarranted administrative conduct may be shown. Furthermore, a submission to the Attorney General is not the exclusive mode of preclearance under § 5. If a State finds the Attorney General's delays unreasonable, or if he objects to the submission, the State "may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia." *Allen* v. *State Board of Elections*, 393 U. S., at 549.

393 U. S. 544 (1969). I have previously expressed my reservations as to the correctness of that holding. See *Perkins* v. *Matthews,* 400 U. S. 379, 397 (1971) (BLACKMUN, J., concurring in judgment).

MR. JUSTICE WHITE, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

Section 5 of the Voting Rights Act of 1965 provides that a covered State may not put into effect any change in voting qualifications or voting standards, practices, or procedures until it either procures a declaratory judgment from the United States District Court for the District of Columbia to the effect that the alteration does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or submits the alteration to the Attorney General and an objection has not been interposed by that official during the ensuing 60 days. In this case, the Attorney General interposed an objection on March 24, 1972, to the March 9 reapportionment plan of the Georgia House of Representatives and shortly thereafter sued to enjoin the use of that plan on the ground that the State had obtained neither the approval of the Attorney General nor a declaratory judgment. The District Court held § 5 was applicable to changes in state apportionment plans and that the section prevented the March 9 reapportionment from going into effect.

I agree that in the light of our prior cases and congressional re-enactment of § 5, that section must be held to reach state reapportionment statutes. Contrary to the Court, however, it is my view that the Attorney General did not interpose an objection contemplated by § 5 and that there was therefore no barrier to the March 9 reapportionment going into effect.

It is arguable from the sparse language of the Act, which merely says that the State's modification will go into effect unless the Attorney General enters an objection, that any objection whatsoever filed by that official will suffice to foreclose effectiveness of the new legislation and force the State into the District Court with the burden of proving that its law is not unconstitutional. I cannot believe, however, that Congress intended to visit upon the States the consequences of such uncontrolled discretion in the Attorney General. Surely, objections by the Attorney General would not be valid if that officer considered himself too busy to give attention to § 5 submissions and simply decided to object to all of them, to one out of 10 of them or to those filed by States with governors of a different political persuasion. Neither, I think, did Congress anticipate that the Attorney General could discharge his statutory duty by simply stating that he had not been persuaded that a proposed change in election procedures would not have the forbidden discriminatory effect. It is far more realistic and reasonable to assume that Congress expected the Attorney General to give his careful and good-faith consideration to § 5 submissions and, within 60 days after receiving all information he deemed necessary, to make up his mind as to whether the proposed change did or did not have a discriminatory purpose or effect, and if it did, to object thereto.

Although the constitutionality of § 5 has long since been upheld, *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), it remains a serious matter that a sovereign State must submit its legislation to federal authorities before it may take effect. It is even more serious to insist that it initiate litigation and carry the burden of proof as to constitutionality simply because the State has employed a particular test or device and a sufficiently low percentage of its citizens has voted in its elections. And why should the State be forced to shoulder that burden where its proposed change is so colorless that the country's highest legal officer professes his inability to make up his mind as to its legality? If he is to object, must he not himself conclude that the proposed change will have the forbidden purpose or effect? Given such a proper objection, the matter would take on a familiar adversary cast; and there would then appear to be a solid basis—at least the probable cause that a federal charge usually imports—for insisting on judicial clearance. Moreover, the issues between the State and the United States, as well as the litigative burden the State would have to bear, could be known and examined and intelligent decision made as to whether to institute suit in the District Court. As it is, the State may be left more or less at sea; for the Attorney General need merely announce that he is not at all convinced that the law submitted to him is not discriminatory.

My idea as to the obligation of the Department of Justice with respect to a submission under § 5 is similar to what Congress itself has provided in § 4, 42 U. S. C. § 1973b (a). Under that provision, a State otherwise covered by the Act can terminate coverage as to it by securing a declaratory judgment that no discriminatory test or device has been used during the past 10 years. In that litigation, the section goes on to provide, the Attorney General must consent to the entry of such a judgment if "he has no reason to believe" that a discriminatory test or device has been used during the 10 years preceding the filing of the action. Thus, in even the far more important context of determining whether a State is in any respect covered by the Act, the Attorney General, if he is to object to a decree favorable to the State, must have reason to believe, and so state, that tests or devices with the prohibited effect have been employed in the past. Surely, where the issue is not termination *vel non,* but the purpose and effect of a single statute, regulation, or other modification of voting procedures, it is not untoward to insist that the Attorney General not object to the implementation of the change until and unless he has reason to believe that the amendment has the prohibited purpose or effect. He should not be able to object by simply saying that he cannot make up his mind or that the evidence is in equipoise.

MR. JUSTICE POWELL, dissenting.

For the reasons stated in his opinion, I agree with MR. JUSTICE WHITE that the Attorney General did not comply with § 5 of the Voting Rights Act, 42 U. S. C. § 1973c, and that therefore Georgia's reapportionment act should have been allowed to go into effect. It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for *advance* review.* As a minimum, assuming the constitutionality of the Act, the Attorney General should be required to comply with it explicitly and to invoke its provisions only when he is able to make an affirmative finding rather than an ambivalent one.

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*As Mr. Justice Black stated, the power vested in federal officials under § 5 of the Act to veto state laws in advance of their effectiveness "distorts our constitutional structure of government." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 358 (1966) (concurring and dissenting). A similar appraisal was made by Mr. Justice Harlan, who characterized § 5, as construed by the Court, as "a revolutionary innovation in American government." *Allen* v. *State Board of Elections*, 393 U. S. 544, 585 (1969) (concurring and dissenting). I have no doubt as to the power of the Congress under the Fifteenth Amendment to enact appropriate legislation to assure that the rights of citizens to vote shall not be denied, abridged, or infringed in any way "on account of race, color, or previous condition of servitude." Indeed, in my view there is more than a power to enact such legislation, there is a duty. My disagreement is with the unprecedented requirement of advance review of state or local legislative acts by federal authorities, rendered the more noxious by its selective application to only a few States.

UNITED STATES *v.* CARTWRIGHT, EXECUTOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-1665. Argued January 16, 1973—Decided May 7, 1973

Shares in mutual funds can be "sold" by the shareholder only back to the fund and only at a set redemption price. Treas. Reg. § 20.2031-8 (b), requiring that such shares be valued for federal estate tax purposes at the current public offering ("asked") price, which is determined by adding a load or sales charge to the net asset value, is clearly inconsistent with the Investment Company Act of 1940, and is therefore invalid. Pp. 550-557.

457 F. 2d 567, affirmed.

White, J., delivered the opinion of the Court, in which Douglas, Brennan, Marshall, Blackmun, and Powell, JJ., joined. Stewart, J., filed a dissenting opinion, in which Burger, C. J., and Rehnquist, J., joined, *post*, p. 557.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Crampton, Richard B. Stone, Loring W. Post,* and *David English Carmack.*

Ralph J. Gregg argued the cause for respondent. With him on the brief was *George M. Zimmermann.**

Mr. Justice White delivered the opinion of the Court.

The Internal Revenue Code of 1954 requires that, for estate tax purposes, the "value" of all property held by a decedent at the time of death be included in the gross estate. 26 U. S. C. § 2031. By regulation, the Secretary of the Treasury has determined that shares in open-end investment companies, or mutual funds, are to be valued at their public offering price or "asked" price at the date of death. Treas. Reg. on Estate Tax § 20.2031-8 (b) (1963). The question this case presents is whether that determination is reasonable in the context of the market for mutual fund shares.

**Meyer Eisenberg* and *Robert L. Augenblick* filed a brief for the Investment Company Institute as *amicus curiae* urging affirmance.

At the time of her death in 1964, Ethel B. Bennett owned approximately 8,700 shares of three mutual funds that are regulated by the Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U. S. C. § 80a-1 *et seq.*[1] The 1940 Act seeks generally to regulate publicly held companies that are engaged in investing in securities. Open-end investment companies, or mutual funds, "dominate" this industry. 1966 SEC Report 43. Unquestionably, the unique characteristic of mutual funds is that they are permitted, under the Act, to market their shares continuously to the public, but are required to be prepared to redeem outstanding shares at any time. § 80a-22 (e). The redemption "bid" price that a shareholder may receive is set by the Act at approximately the fractional value per share of the fund's net assets at the time of redemption. § 80a-2 (a)(32). In contrast, the "asked" price, or the price at which the fund initially offers its shares to the public, includes not only the net asset value per share at the time of sale, but also a fixed sales charge or "sales load" assessed by the fund's principal underwriter who acts as an agent in marketing the fund's shares. § 80a-2 (a)

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[1] The decedent owned 2,568.422 shares of Investors Mutual, Inc., in her own name, and 2,067.531 shares as trustee for her daughter. The decedent also owned 2,269.376 shares of Investors Stock Fund, Inc., and 1,869.159 shares of Investors Selective Fund, Inc.

For thorough discussions of the operations of open-end investment companies, see SEC Report on Public Policy Implications of Investment Company Growth, H. R. Rep. No. 2337, 89th Cong., 2d Sess. (1966) (hereinafter 1966 SEC Report); SEC Report of Special Study of Securities Markets, c. XI, Open-End Investment Companies (Mutual Funds), H. R. Doc. No. 95, pt. 4, 88th Cong., 1st Sess. (1963) (hereinafter 1963 Special Study).

(35).[2] Sales loads vary within fixed limits from mutual fund to mutual fund, but all are paid to the fund's underwriters; the charges do not become part of the assets of the fund.[3] The sales loads of the funds held by the decedent ranged from seven and eight percent to one percent of the fractional net asset value of the funds' shares.

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[2] A number of mutual funds are so-called "no-load funds"; in such cases the bid and asked prices are the same. See 1966 SEC Report 58-59. The underwriter for all three funds involved in this case is Investors Diversified Services, Inc. (IDS), which is not itself an open-end investment company. IDS also serves as the investment manager of the funds, for which it receives separate management fees. See 15 U. S. C. § 80a-15.

[3] The 1963 Special Study 96-97 explained the trading in mutual fund shares as follows:

"Mutual fund shares are not traded on exchanges or generally in the over-the-counter market, as are other securities, but are sold by the fund through a principal underwriter, and redeemed by the fund, at prices which are related to 'net asset value.' The net asset value per share is normally computed twice daily by taking the market value at the time of all portfolio securities, adding the value of other assets and subtracting liabilities, and dividing the result by the number of shares outstanding. Shares of most funds are sold for a price equal to their net asset value plus a sales charge or commission, commonly referred to as the 'sales load,' and usually ranging from 7.5 to 8.5 percent of the amount paid, or 8.1 to 9.3 percent of the amount invested. A few funds, however, known as 'no-load' funds, offer their shares for sale at net asset value without a sales charge. Shares of most funds are redeemed or repurchased by the funds at their net asset value, although a few funds charge a small redemption fee. The result of this pricing system, it is apparent, is that the entire cost of selling fund shares is generally borne exclusively by the purchaser of new shares and not by the fund itself. In this respect the offering of mutual fund shares differs from, say, the offering of new shares by a closed-end investment company or an additional offering 'at the market' of shares of an exchange-listed security, where at least a portion of the selling cost is borne by the company selling the shares." (Footnote omitted.)

Private trading in mutual fund shares is virtually nonexistent.[4] Thus, at any given time, under the statutory scheme created by the Investment Company Act, shares of any open-end mutual fund with a sales load are being sold at two distinct prices. Initial purchases by the public are made from the fund, at the "asked" price, which includes the load. But shareholders "sell" their shares back to the fund at the statutorily defined redemption or bid price.

Respondent is the executor of the decedent's estate. On the federal estate tax return, he reported the value of the mutual fund shares held by the decedent at their redemption price, which amounted to about $124,400. The Commissioner assessed a deficiency based upon his valuation of the shares at their public offering or asked price, pursuant to Treas. Reg. § 20.2031-8 (b).[5] Valued on that basis, the shares were worth approximately $133,300. Respondent paid the deficiency of about $3,100, including interest, filed a timely claim for a refund, and, when that claim was denied, commenced a refund action in Federal District Court on the ground that the valuation based on § 20.2031–8 (b) was unreasonable. The District Court agreed with respondent and held the Regulation invalid. 323 F. Supp. 769. The Court of Appeals affirmed. 457 F. 2d 567. We granted the Government's petition for certiorari, 409 U. S. 840, because of the conflict among the circuits.[6]

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[4] See *Estate of Wells* v. *Commissioner,* 50 T. C. 871, 873 (1968), aff'd *sub nom. Ruehlmann* v. *Commissioner,* 418 F. 2d 1302 (CA6 1969), cert. denied, 398 U. S. 950 (1970); 1966 SEC Report 42; and 1963 Special Study 96.

[5] The regulation reads, in part, as follows:

"(b) *Valuation of shares in an open-end investment company.* (1) The fair market value of a share in an open-end investment company (commonly known as a 'mutual fund') is the public offering price of a share, adjusted for any reduction in price available to the public in acquiring the number of shares being valued. In the absence of an affirmative showing of the public offering price in effect at the time of death, the last public offering price quoted by the company for the date of death shall be presumed to be the applicable public offering price. . . .

"(2) The provisions of this paragraph shall apply with respect to estates of decedents dying after October 10, 1963."

This regulation was promulgated in 1963, T. D. 6680, 28 Fed. Reg. 10872, after some years of confusion within the Treasury Department and between that Department and the Department of Justice. See the District Court's opinion, 323 F. Supp. 769, 777. A corresponding regulation was adopted for gift tax purposes. Treas. Reg. § 25.2512-6 (b).

We recognize that this Court is not in the business of administering the tax laws of the Nation. Congress has delegated that task to the Secretary of the Treasury, 26 U. S. C. § 7805 (a), and regulations promulgated under his authority, if found to "implement the congressional mandate in some reasonable manner," must be upheld. *United States* v. *Correll,* 389 U. S. 299, 307 (1967). See *Bingler* v. *Johnson,* 394 U. S. 741, 749–751 (1969); *Commissioner* v. *South Texas Lumber Co.,* 333 U. S. 496, 501 (1948). But that principle is to set the framework for judicial analysis; it does not displace it. We find that the contested regulation is unrealistic and unreasonable, and therefore affirm the judgment of the Court of Appeals.

In implementing 26 U. S. C. § 2031, the general principle of the Treasury Regulations is that the value of property is to be determined by its fair market value at the time of the decedent's death. "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Treas. Reg. § 20.2031-1 (b). The willing buyer-willing seller test of fair market value is nearly as old as the federal income, estate, and gifts taxes themselves, and is not challenged here.[7] Under this test, it is clear that if the decedent had owned ordinary corporate stock listed on an exchange, its "value" for estate tax purposes would be the price the estate could have obtained if it had sold the stock on the valuation date, that price being, under Treas. Reg. § 20.2031-2 (b), the mean between the highest and lowest quoted selling prices on that day. Respondent urges that similar treatment be given mutual fund shares and that, accordingly, their value be measured by the redemption price at the date of death, the only price that the estate could hope to obtain if the shares had been sold.

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[6] In *Estate of Wells* v. *Commissioner, supra,* the Tax Court sustained the regulation, with six judges dissenting. That decision was affirmed by the Sixth Circuit in *Ruehlmann* v. *Commissioner,* 418 F. 2d 1302 (1969), cert. denied, 398 U. S. 950 (1970). The companion gift tax regulation was upheld in *Howell* v. *United States,* 414 F. 2d 45 (CA7 1969). Regulation § 20.2031–8 (b) was held invalid in *Davis* v. *United States,* 460 F. 2d 769 (CA9 1972), aff'g 306 F. Supp. 949 (CD Cal. 1969). See also *Hicks* v. *United States,* 335 F. Supp. 474 (Colo. 1971), appeal pending in the Tenth Circuit, No. 72–1360.

Respondent's argument has the clear ring of common sense to it, but the United States maintains that the redemption price does not reflect the price that a willing buyer would pay, inasmuch as the mutual fund is under a statutory obligation to redeem outstanding shares whenever they are offered. According to the Government, the only market for mutual fund shares that has both willing buyers and willing sellers is the public offering market. Therefore, the price in that market, the asked price, is an appropriate basis for valuation. The central difficulty with this argument is that it unrealistically bifurcates the statutory scheme for the trading in mutual fund shares. To be sure, the fund is under an obligation to redeem its shares at the stated price. 15 U. S. C. § 80a–22 (e). But, at the time of the original purchases, both the fund and the purchasers are aware of that duty and both willingly enter into the sale transactions nonetheless. As Judge Winner correctly observed in *Hicks* v. *United States,* 335 F. Supp. 474, 481 (Colo. 1971):

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[7] See Treas. Reg. 63 Relating to Estate Tax Under the Revenue Act of 1921, Art. 13 (1922 ed.) ("The criterion of such value is the price which a willing buyer will pay to a willing seller for the property in question under the circumstances existing at the date of the decedent's death . . ."); Treas. Reg. 105 Relating to the Estate Tax Under the Internal Revenue Code (of 1939), § 81.10 (1942).

> "Viewing the contract in this light meets every test of the 'willing buyer-willing seller' definition usually applied in the determination of market value. The 'willing buyer' is the fully informed person who agrees to buy the shares, agreeing at that time to sell them to the fund—the only available repurchaser—at the redemption price. The 'willing seller' is the fund which sells the shares at market value plus a load charge, and which agrees to buy the shares back at market less the load charge. That is the market, and it is the only market. It is a market made up of informed buyers and an informed seller, all dealing at arm's length."

In the context of the Investment Company Act, the redemption price may thus be properly viewed only as the final step in a voluntary transaction between a willing buyer and a willing seller. As a matter of statutory law, holders of mutual fund shares cannot obtain the "asked" price from the fund. That price is never paid by the fund; it is used by the fund when selling its shares to the public—and even then the fund receives merely the net asset value per share from the sale, with the sales load being paid directly to the underwriter. In short, the only price that a shareholder may realize and that the fund—the only buyer—will pay is the redemption price. In the teeth of this fact, Regulation § 20.2031-8 (b) purports to assign a value to mutual fund shares that the estate could not hope to obtain and that the fund could not offer.

In support of the Regulation, the Government stresses that many types of property are taxed at values above those which could be realized during an actual sale. For example, ordinary corporate stock is valued at its fair market price without taking into account the brokerage commission that a seller must generally pay in order to sell the stock. Respondent does not contend that that approach is inappropriate or that, for example, the value of ordinary stock in an estate should be the market price at the time less anticipated brokerage fees. But § 20.2031-8 (b) operates in an entirely different fashion. The regulation includes as an element of value the commission cost incurred in the hypothetical *purchase* of the mutual fund shares already held in the decedent's estate. If that principle were carried over to the ordinary stock situation, then a share traded at $100 on the date of death would be valued, not at $100 as it now is, but at, say, $102, representing the "value" plus the fee that a person buying the stock on that day would have to pay. It hardly need be said that such a valuation method is at least inconsistent with long-established Treasury practice and would appear at odds with the basic notions of valuation embodied in the Internal Revenue Code.[8] See *Estate of Wells* v. *Commissioner,* 50 T. C. 871, 880 (1968) (Tannenwald, J., dissenting).

Even if it were assumed that the public offering price were somehow relevant to the value of mutual fund shares privately held, there would still be the difficulty that shares so held are, in important respects, similar to ordinary corporate stock held subject to a restrictive agreement (such as a first-refusal right at a specified price). With respect to the value of such stock, the Treasury Regulations have provided that the price that may be obtained in the marketplace does not control. Rather, so long as the restriction is a bona fide one, the value of the shares in the hands of the restricted stockholder is determined in accordance with the terms of the restriction. Treas. Reg. § 20.2031-2 (h). Outstanding mutual fund shares are likewise held subject to a restriction, as the Court of Appeals noted. 457 F. 2d, at 571. Those shares may not be "sold" at the public offering price. By statute, they may be "sold" back to the mutual fund only at the redemption price. We see no valid justification for disregarding this reality connected with the ownership of mutual fund shares.

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[8] Whatever the situations may be where it is realistic and appropriate under Treas. Reg. § 20.2031-1 (b) to use a standardized retail price to measure value for estate tax purposes, it is sufficient to note here that, for the reasons given, the valuation of mutual fund shares does not present one of those situations.

The Government nevertheless argues that Treas. Reg. § 20.2031-8 (b) reasonably values the "bundle of rights" that is transferred with the ownership of the mutual fund shares.[9] For this argument, heavy reliance is placed on this Court's decisions in *Guggenheim* v. *Rasquin*, 312 U. S. 254 (1941); *Powers* v. *Commissioner*, 312 U. S. 259 (1941); *United States* v. *Ryerson*, 312 U. S. 260 (1941), which held that the cash-surrender value of a single-premium life insurance policy did not necessarily represent its only taxable value for federal gift tax purposes.[10] In *Guggenheim,* the lead case, the taxpayer purchased single-premium life insurance policies with an aggregate face value of one million dollars for approximately $852,000 and, shortly thereafter, gave the policies to her children. On the gift tax return, the policies were listed at their cash-surrender value of about $717,000—admittedly the only amount the donor or the donees could receive, if the policies were surrendered. But the Commissioner valued the gift at the cost of the policies, and this Court upheld that valuation: "the owner of a fully paid life insurance policy has more than the mere right to surrender it; he has the right to retain it for its investment virtues and to receive the face amount of the policy upon the insured's death. That these latter rights are deemed by purchasers of insurance to have substantial value is clear from the difference between the cost of a single-premium policy and its immediate or early cash-surrender value . . . ." 312 U. S., at 257. Because the "entire bundle of rights in a single-premium policy" is so difficult to give a realistic value to, the Court deferred to the Commissioner's determination and permitted valuation to be based on cost: "Cost is cogent evidence of value." *Id.,* at 258. But as the District Court observed, 323 F. Supp., at 773, shares in mutual funds are quite unlike insurance policies, particularly in light of the policyowner's right to receive the full face value of the policy upon the insured's death. Moreover, mutual fund shares present no analogous difficulties in valuation. On any given day, their commercial value may be determined by turning to the financial pages of a newspaper. Obviously, with respect to mutual funds, there are "investment virtues" and the prospects of capital gains or dividends. But that is true of any corporate security. Nonetheless, shareholders in mutual funds are singled out by the Regulation and their holdings valued at an unrealistic replacement cost—which includes "brokers' commissions"—while other shareholdings are valued without regard to such commissions.

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[9] The Government argues that, as a practical matter, an estate would rarely be hurt by valuation of mutual fund shares at the asked price, because Treas. Reg. § 20.2053-3 (d)(2) permits an estate to deduct the difference between the asked and bid prices if the shares are sold to pay certain enumerated expenses. By its terms, however, that regulation applies only if "the sale is *necessary*" to pay those expenses. (Emphasis added.) In any event, the regulation is inapplicable altogether if the shares are transferred in kind to an heir or legatee.

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[10] It is no coincidence that the contested regulation was placed in Treas. Reg. § 20.2031–8, which deals with "[v]aluation of certain life insurance and annuity contracts . . . ." But we agree with Judge Winner:

"The Commissioner cannot cross-breed life insurance and investment trust shares by the simple expedient of discussing them in separate paragraphs of a single regulation." *Hicks* v. *United States,* 335 F. Supp., at 482.

The unrealistic nature of this difference in treatment may be demonstrated by comparing the treatment of shares in load funds, such as the decedent's, with shares in no-load funds. Obviously, even if it could be argued that there are relevant differences between mutual fund shares generally and corporate stock, there are no differences in terms of "investment virtues" or related interests between no-load and load fund shares. Indeed, as the terms imply, the only real distinction between the two is that one imposes an initial sales charge and the other does not.[11] Nonetheless, under the Regulation, a share in a no-load fund is valued at its net asset value while a share in a load fund is valued at net asset value plus sales charge. To further illustrate, consider a decedent who had purchased one share in each of two no-load mutual funds, at $100 per share. The decedent died before either appreciated, but after one of the funds had changed to a load fund. Although both shares are still worth $100, and could be redeemed for only that amount, the Regulation would require that one be valued at $100 and the other at $100 plus the new load charge. A regulation that results in such differing treatment of identical property should be supported by something more than a transparent analogy to life insurance.

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[11] See 1966 SEC Report 51–59.

We recognize that normally "Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes." *Commissioner* v. *South Texas Lumber Co.,* 333 U. S., at 501. But even if the Regulation contested here is not, on its face, technically inconsistent with § 2031 of the Internal Revenue Code, it is manifestly inconsistent with the most elementary provisions of the Investment Company Act of 1940 and operates without regard for the market in mutual fund shares that the Act created and regulates. Cf. *L. E. Shunk Latex Products, Inc.* v. *Commissioner,* 18 T. C. 940 (1952). Congress surely could not have intended § 2031 to be interpreted in such a manner. The Regulation also imposes an unreasonable and unrealistic measure of value. We agree with Judge Tannenwald, who stated at the very outset of the dispute over Regulation § 20.2031–8 (b), that "it does not follow that, because [the Commissioner] has a choice of alternatives, his choice should be sustained where the alternative chosen is unrealistic. In such a situation the regulations embodying that choice should be held to be unreasonable." *Estate of Wells* v. *Commissioner,* 50 T. C., at 878 (dissenting opinion).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

This case presents a narrow issue of law regarding the valuation of certain assets—shares in an open-end investment company or "mutual fund"—for purposes of the federal estate tax. The case turns upon a single question of law: whether or not § 20.2031–8 (b) of the Treasury Regulations, which provides a specific method for valuing such shares, represents a reasonable implementation of the legislation enacted by Congress.

On December 4, 1964, Mrs. Ethel Bennett died testate leaving, among other property, several thousand shares in three separate mutual funds. Each of the funds in question is managed by a firm known as Investors Diversified Services, Inc., and all are subject to regulation by the Securities and Exchange Commission under the Investment Company Act of 1940. In his tax return for the estate, the respondent, Mrs. Bennett's executor, valued these shares at their so-called "net asset value," that is, the amount at which the estate is entitled, as a matter of law, to have the shares redeemed by the issuer. The net asset value of a mutual fund share is calculated daily by the issuing company, and is equivalent to the fractional value per share of the fund's total net assets on that day. In addition to serving as a gauge for the redemption value of fund shares already issued, net asset value is also employed by the issuing companies in determining the price at which they will offer new shares in the fund to the public on any given day. In general, such shares are sold to the public at their net asset value plus a sales charge or "load." The load is a varying percentage of the value of the shares sold, and fluctuates in accordance with the size of the purchase. In the case of Mrs. Bennett's shares, the maximum allowable sales load at the time of her death ranged between 7% and 8%, and the minimum was 1%.

Upon receipt of respondent's return, the Commissioner, acting in accordance with Treas. Reg. § 20.2031-8 (b),* assessed a deficiency, contending that the value of

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*The text of the regulation, insofar as relevant here, reads as follows: "The fair market value of a share in an open-end investment company (commonly known as a 'mutual fund') is the public offering price of a share, adjusted for any reduction in price available to the public in acquiring the number of shares being valued. . . ." There is a companion Gift Tax Regulation of identical import. See 26 CFR § 25.2512-6 (b).

Mrs. Bennett's shares for federal estate tax purposes was their public offering price on the date of her death, that is, the price which a member of the public would have had to pay to acquire similar shares from the issuer. This price would, of course, encompass not only the net asset value of the shares, but also the applicable sales load. Such a method of valuation for mutual fund shares is expressly prescribed by the Treasury Regulation noted above. Thus, the sole question before us is whether that Regulation constitutes a reasonable exercise by the Commissioner of his statutory power to prescribe "all needful rules" for the proper enforcement of the tax laws, see 26 U. S. C. § 7805, or whether the Regulation is so inherently unreasonable and inconsistent with the statute as to be invalid. *United States* v. *Correll,* 389 U. S. 299; *Bingler* v. *Johnson,* 394 U. S. 741. Upon the facts presented by this case, I cannot say that the Commissioner's Regulation is invalid, and I therefore dissent from the decision of the Court.

At the outset, it may be well to note the basic general rule with respect to valuation that prevails under our estate tax laws. This rule is embodied in Treas. Reg. § 20.2031-1 (b), and provides that the value of property includable in a decedent's estate shall be the fair market value of such property at the date of the decedent's death. "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." 26 CFR § 20-2031-1 (b).

The difficulty in applying this rule to mutual fund shares—a difficulty which, no doubt, led the Commissioner to promulgate Regulation § 20.2031-8 (b)—is that such shares *once issued* are not subject to disposition in a market of "willing buyers" and "willing sellers." Indeed, as both the District Court and the Court of Appeals noted, the only practical means of disposing of mutual fund shares once acquired is redemption, and redemption cannot be deemed a sale of the sort described in the general rule (26 CFR § 20.2031-1 (b)), since the party purchasing (the issuing company) is under an absolute obligation to redeem the shares when tendered, and the party selling has no practical alternative, if he wishes to liquidate his holdings, other than to offer them to the issuing company for redemption.

This being the case, the Commissioner was faced with the problem of establishing a method of valuing the shares most nearly equal to their inherent worth. In doing so, he chose not to treat their redemption value as dispositive of this question. In promulgating his Regulation, he might rationally have considered that "on demand" redemption at net asset value is but one of many rights incident to the ownership of mutual fund shares.

For example, in the case of Mrs. Bennett's shares, her estate had not only the right to redeem them "on demand," but also to retain them; and if it had done so it would have possessed not only the normal dividend and capital gains rights associated with most investments, but also the right to have such dividends and capital gains as accrued applied toward the purchase of additional shares at a price *below* that which a member of the general public would have had to pay for such shares. In addition, under the investment contracts involved here, Mrs. Bennett's estate would have had the right to exchange her shares in any one of the three mutual funds involved for those of either or both of the other funds managed by Investors Diversified Services, Inc.—without paying the usual sales charge or load.

The Commissioner has determined that the proper method of valuing *all* the rights, both redemptive and otherwise, incident to the ownership of mutual fund shares is to determine what a member of the general public, acting under no constraints, would have had to pay for these rights if purchased on the open market. And, as noted earlier, although no such market exists for mutual fund shares *once issued* to an investor, a perfectly normal market of willing buyers and sellers does exist with respect to such shares prior to their issuance. Thus, the Commissioner took the price at which the shares would have sold on this market as fairly reflective of their inherent worth. I cannot say that this method of valuation adopted by the Commissioner, and embodied in Regulation § 20.2031-8 (b), is so unreasonable and inconsistent with the statute as to render it invalid.

The respondent's claim that the regulation is invalid is grounded upon two principal arguments. First, he says, the estate is being taxed on an amount in excess of what it can, as a practical matter, realize from the disposition of the mutual fund shares. But this is equally true of many other assets subject to taxation under our estate tax laws. For example, real property passing into an estate is taxed upon its full fair market value, despite the fact that as a practical matter the estate must usually pay some percentage of that sum in brokerage fees if it wishes to dispose of the property and receive cash in its stead. This attack upon the Regulation thus amounts to no less than an attack upon the whole system of valuation embodied in the Treasury Regulations on Estate Tax, based as it is upon fair value in an open market. I am not ready to hold that this long-established and long-accepted system is basically invalid.

The respondent's second argument is that the Regulation places a higher valuation on mutual fund shares than is placed upon registered common stock shares and other similarly traded securities. This argument assumes that the redemption or net asset value of a mutual fund share is identical to the fair market value of a traded security, and, by a parity of reasoning, that the sales charge or load associated with mutual fund purchases is equivalent to the commission that a stockbroker charges a purchaser of securities. Under this view, the Commissioner would be entitled to tax mutual fund shares passing into an estate only on their net asset value, since in the allegedly comparable situation of common stock shares no consideration may be given to brokers' commissions in arriving at an appropriate valuation for estate tax purposes. See 26 CFR § 20.2031-2 (b).

Although this argument has a certain superficial appeal, the analogy on which it relies is hardly an exact one. For an estate in disposing of marketable securities must pay a brokerage commission on their *sale,* and will thus realize less than the amount at which the securities have been valued, while an estate turning in mutual fund shares for redemption pays no commission or other surcharge whatever. Moreover, unlike traditional securities, there is no open trading market for mutual fund shares once issued and in the hands of an investor. If such a market of willing buyers and sellers did exist, the Commissioner would doubtless be bound to treat mutual fund shares exactly like other securities. But where no market for an asset exists, there simply is no market price to provide a readily identifiable standard for valuation. Under these circumstances, it is the Commissioner's duty under the statute to establish criteria for determining the true worth of the totality of rights and benefits incident to ownership of the asset. This the Commission has done in Regulation § 20.2031-8 (b) by providing that the value of a mutual fund share for federal estate tax purposes shall be the price a member of the general public would have to pay to acquire such share. Such an approach to the valuation of assets not regularly traded in a market of willing buyers and sellers has already been sustained by this Court in a case closely akin to the case before us. See *Guggenheim* v. *Rasquin,* 312 U. S. 254.

Given the peculiar characteristics of mutual fund shares, it is arguable that the Commissioner might reasonably have adopted a method of valuation different from that which he has chosen. But that is a question that is not for us to decide. "[We] do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U. S. C. § 7805 (a). In this area of limitless factual variations, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.'" *United States* v. *Correll,* 389 U. S., at 306–307. See *Bingler* v. *Johnson,* 394 U. S., at 750.

I would reverse the judgment of the Court of Appeals and sustain the validity of the Regulation.

GIBSON ET AL. *v.* BERRYHILL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 71-653. Argued January 9-10, 1973—Decided May 7, 1973

Appellees, licensed optometrists employed by Lee Optical Co., who were not members of the Alabama Optometric Association (Association), were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (Board), all members of which were Association members. The Board deferred proceedings while a suit it had brought against Lee Optical and optometrists employed by it to enjoin the company from practicing optometry was litigated in the state trial court. The charges against the individual defendants were dismissed but the court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. When the Board revived the Association's charges against appellees, they sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The court concluded that it was not barred from acting by the federal anti-injunction statute since only administrative proceedings were involved and that exhaustion of administrative remedies was not mandated where the administrative process was biased in that the Board by its litigation in the state courts had prejudged the case against appellees and the Board members had an indirect pecuniary interest in the outcome. The District Court enjoined the Board proceedings but thereafter and before this appeal was taken, the State's highest court reversed the judgment against Lee Optical and held that the optometry law did not prohibit a licensed optometrist from working for a corporation. *Held:*

1. The anti-injunction statute did not bar the District Court from issuing the injunction since appellees brought suit under the Civil Rights Act, 42 U. S. C. § 1983. Pp. 572-575.

2. Nor did the rule of *Younger* v. *Harris,* 401 U. S. 37, or principles of comity require the District Court to dismiss appellees' suit in view of the pending Board proceeding since the appellees

alleged and the District Court concluded that the Board's bias rendered it incompetent to adjudicate the issues. Pp. 575–577.

3. Since the Board was composed solely of private practitioners and the corporate employees it sought to bar from practice constituted half the optometrists in the State, the District Court was warranted in concluding that the Board members' pecuniary interest disqualified them from passing on the issues. Pp. 578–579.

4. Though the District Court did not abuse its discretion in not abstaining until the *Lee Optical* decision was rendered by the Alabama Supreme Court, the principles of equity, comity, and federalism warrant reconsideration of this case in the light of that decision. Pp. 579–581.

331 F. Supp. 122, vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post*, p. 581. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 581.

Richard A. Billups, Jr., argued the cause for appellants. With him on the brief were *William Baxley,* Attorney General of Alabama, and *J. G. L. Marston III* and *Donald George Valeska II,* Assistant Attorneys General.

Harry Cole argued the cause for appellees. With him on the brief were *James J. Carter* and *Douglas E. Bergman.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Prior to 1965, the laws of Alabama relating to the practice of optometry permitted any person, including a business firm or corporation, to maintain a department in which "eyes are examined or glasses fitted," provided that such department was in the charge of a duly licensed optometrist. This permission was expressly conferred by § 210 of Title 46 of the Alabama Code of 1940, and also inferentially by § 211 of the Code which regulates the advertising practices of of optometrists, and which, until 1965, appeared to contemplate the existence of commercial stores with optical departments.[1] In 1965, § 210 was repealed in its entirety by the Alabama Legislature, and § 211 was amended so as to eliminate any direct reference to optical departments maintained by corporations or other business establishments under the direction of employee optometrists.[2]

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[1] Sections 210 and 211 of c. 11, Tit. 46, of the Code of Alabama, 1940, provided, prior to 1965, as follows:

"§ 210. Store where glasses are sold; how department conducted.—Nothing in this chapter shall be so construed as to prevent any person, firm, or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation."

"§ 211. False or misleading statements in advertisements or stores having optometry department.—It shall be unlawful for any person, firm or corporation, engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or publish, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. And it shall be unlawful for any individual, firm or corporation, engaged in the sale of goods, wares or merchandise who maintains or operates, or who allows to be maintained and operated in connection with said mercantile business an optometry department; or who rents or subleases to any person or persons for the purpose of engaging in the practice of optometry therein, any portion of or space in said store, premises or establishment in which such person, firm or corporation is engaged in said mercantile business, to publish, or circulate, or print or cause to be printed, by any means whatsoever, any advertisement or notice of the optometry department maintained, operated, or conducted in said establishment or place of business, in which said advertisement or notice appear any untruthful, improbable, impossible, or misleading statement or statements, or anything calculated to mislead or deceive the public."

Sections 190–213, regulating the practice of optometry in Alabama, were originally adopted in 1919.

Soon after these statutory changes, the Alabama Optometric Association, a professional organization whose membership is limited to independent practitioners of optometry *not* employed by others, filed charges against various named optometrists, all of whom were duly licensed under Alabama law but were the salaried employees of Lee Optical Co. The charges were filed with the Alabama Board of Optometry, the statutory body with authority to issue, suspend, and revoke licenses for the practice of optometry. The gravamen of these charges was that the named optometrists, by accepting employment from Lee Optical, a corporation, had engaged in "unprofessional conduct" within the meaning of § 206 of the Alabama optometry statute, and hence were practicing their profession unlawfully.[3] More particularly,

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[2] Section 211, as amended, reads as follows:

"§ 211. False or misleading statements in advertisements or circulars.—It shall be unlawful for any person engaged in the practice of optometry in this state to print or cause to be printed, or circulate or cause to be circulated, or published, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public."

[3] Section 206, insofar as relevant here, provides as follows:

"§ 206. License may be suspended or revoked.—A license issued to any person may be suspended for a definite period of time, or revoked by the state board of optometry for any of the following reasons; to-wit: . . . For unprofessional conduct. 'Unprofessional conduct' shall be defined to mean any conduct of a character likely to deceive or defraud the public, lending his license by any licensed optometrist to any person, the employment of 'cappers,' or 'steerers' to obtain business, 'splitting' or dividing a fee with any person or persons, the obtaining of any fee or compensation by fraud or misthe Association charged the named individuals with, among other things, aiding and abetting a corporation in the illegal practice of optometry; practicing optometry under a false name, that is, Lee Optical Co.; unlawfully soliciting the sale of glasses; lending their licenses to Lee Optical Co.; and splitting or dividing fees with Lee Optical.[4] It was apparently the Association's position that, following the repeal of § 210 and the amendment of § 211, the practice of optometry by individuals as employees of business corporations was no longer permissible in Alabama, and that, by accepting such employment, the named optometrists had violated the ethics of their profession. It was prayed that the Board revoke the licenses of the individuals charged following due notice and a proper hearing.

Two days after these charges were filed by the Association in October 1965, the Board filed a suit of its own in state court against Lee Optical, seeking to enjoin the company from engaging in the "unlawful practice of optometry." The Board's complaint also named 13 optometrists employed by Lee Optical as parties defendant,

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representation, employing directly or indirectly any suspended or unlicensed optometrist to do any optometrical work, by use of any advertising, carrying the advertising of articles not connected with the profession, the employment of any drugs or medicines in his practice unless authorized to do so by the laws covering the practice of medicine of this state, or the doing or performing of any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice."

The section also provides for a hearing before the Board upon due notice of an accused license holder. At such a hearing the accused is entitled to be represented by counsel, to cross-examine the witnesses against him, and to have all testimony taken down by a stenographer.

[4] Some of the charges leveled against the named optometrists are covered by sections of the Alabama optometry statute other than § 206, *e. g.*, "practicing optometry under a false name" (§ 191), "unlawfully soliciting the sale of glasses" (§ 203), etc.

charging them with aiding and abetting the company in its illegal activities, as well as with other improper conduct very similar to that charged by the Association in its complaint to the Board.

Proceedings on the Association's charges were held in abeyance by the Board while its own state court suit progressed. The individual defendants in that suit were dismissed on grounds that do not adequately appear in the record before us; and, eventually, on March 17, 1971, the state trial court rendered judgment for the Board, and enjoined Lee Optical both from practicing optometry without a license and from employing licensed optometrists.[5] The company appealed this judgment.

Meanwhile, following its victory in the trial court, the Board reactivated the proceedings pending before it since 1965 against the individual optometrists employed by Lee, noticing them for hearings to be held on May 26 and 27, 1971. Those individuals countered on May 14, 1971, by filing a complaint in the United States District Court naming as defendants the Board of Optometry and its individual members, as well as the Alabama Optometric Association and other individuals. The suit, brought under the Civil Rights Act of 1871, 42 U. S. C. § 1983, sought an injunction against the scheduled hearings on the grounds that the statutory scheme regulating the practice of optometry in Alabama[6] was unconstitutional insofar as it permitted the Board to hear the pending charges against the individual plaintiffs in the federal suit.[7] The thrust of the complaint was that the Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law.

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[5] A period of nearly five and one-half years passed between the filing of the Board's complaint against Lee Optical, and the decision of the state trial court. Much of this delay appears to be attributable to certain procedural wranglings in the court concerning whether the Board had the power to bring an injunctive action against those it believed to be practicing optometry unlawfully. During the pendency of the litigation, the Alabama Legislature passed a statute expressly conferring such power, both prospectively and retroactively, on state licensing boards, and the suit appears to have proceeded expeditiously thereafter.

[6] §§ 190–213 of c. 11, Tit. 46, of the Alabama Code of 1940.

A three-judge court was convened in August 1971, and shortly thereafter entered judgment for plaintiffs, enjoining members of the State Board and their successors "from conducting a hearing on the charges heretofore preferred against the Plaintiffs" and from revoking their licenses to practice optometry in the State of Alabama.

In its supporting opinion, 331 F. Supp. 122, the District Court first considered whether it should stay its hand and defer to the then-pending state proceedings—that is, whether the situation presented was one which would permit of immediate federal intervention to restrain the actions of a state administrative body. That question was answered in the affirmative, the court holding that 28 U. S. C. § 2283, the federal anti-injunction statute, was not applicable to state administrative proceedings even where those proceedings were adjudicatory in character. Moreover, the District Court also held that neither *Younger* v. *Harris*, 401 U. S. 37 (1971), nor the doctrine normally requiring exhaustion of administrative remedies forbade a federal injunction where, as the court found to be true here, the administrative process was so defective and inadequate as to deprive the plaintiffs of due process of law.

This conclusion with respect to the deficiencies in the pending proceedings against plaintiffs, although an amalgam of several elements, amounted basically to a sustaining of the plaintiffs' allegation of bias. For the District Court, the inquiry was not whether the Board members were "actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him." 331 F. Supp., at 125. Such a possibility of bias was found to arise in the present case from a number of factors. First, was the fact that the Board, which acts as both prosecutor and judge in delicensing proceedings, had previously brought suit against the plaintiffs on virtually identical charges in the state courts. This the District Court took to indicate that members of the Board might have "preconceived opinions" with regard to the cases pending before them. Second, the court found as a fact that Lee Optical Co. did a large business in Alabama, and that if it were forced to suspend operations the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business. Thus, a serious question of a personal financial stake in the matter in controversy was raised. Finally, the District Court appeared to regard the Board as a suspect adjudicative body in the cases then pending before it, because only members of the Alabama Optometric Association could be members of the Board, and because the Association excluded from membership optometrists such as the plaintiffs who were employed by other persons or entities. The result was that 92 of the 192 practicing optometrists in Alabama were denied participation in the governance of their own profession.

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[7] More specifically, the plaintiffs attacked §§ 206 and 192 of the statute which provide, respectively, that the Board shall have the power to entertain delicensing proceedings and that its membership shall be limited to members of the Alabama Optometric Association.

The court's ultimate conclusion was "that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events."[8] 331 F. Supp., at 126.

Appeal was taken to this Court and probable jurisdiction noted on June 26, 1972. 408 U. S. 920. Meanwhile, on March 30, 1972, the Supreme Court of Alabama reversed the judgment of the state trial court in the *Lee Optical Co.* case,[9] holding that nothing in the Alabama statutes pertaining to optometry evidenced "a legislative policy that an optometrist duly qualified and licensed under the laws of this state, may not be employed by another to examine eyes for the purpose of prescribing eyeglasses."[10] 288 Ala. 338, 346, 261 So. 2d 17, 24.

It is against this procedural background that we turn to a consideration of the issues presented by this appeal.

I

We agree with the District Court that neither statute nor case law precluded it from adjudicating the issues before it and from issuing the injunction if its decision on the merits was correct.

Title 28 U. S. C. § 2283, the anti-injunction statute, prohibits federal courts from enjoining state court proceedings, but the statute excepts from its prohibition injunctions which are "expressly authorized" by another Act of Congress.[11] Last Term, after the District Court's decision here, this Court determined that actions brought under the Civil Rights Act of 1871, 42 U. S. C. § 1983, were within the "expressly authorized" exception to the ban on federal injunctions.[12] *Mitchum* v. *Foster,* 407 U. S. 225 (1972).

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[8] The District Court also dismissed, without prejudice, the Board's counterclaim in the present suit which sought a judgment barring the plaintiffs from practicing optometry in Alabama.

[9] See *Lee Optical Co. of Alabama* v. *State Board of Optometry*, 288 Ala. 338, 261 So. 2d 17, rehearing denied Apr. 27, 1972.

[10] In a companion case, *House of $8.50 Eyeglasses* v. *State Board of Optometry*, 288 Ala. 349, 261 So. 2d 27 (1972), the Alabama Supreme Court reversed the judgment of another lower state court which had enjoined a corporation from unlawfully practicing optometry through its optometrist employees. In that case, the individual optometrists involved were also enjoined from unlawfully practicing their profession. Both injunctions were dissolved by the Alabama Supreme Court.

Our decision in *Mitchum,* however, held only that a district court was not absolutely barred by statute from enjoining a state court proceeding when called upon to do so in a § 1983 suit. As we expressly stated in *Mitchum,* nothing in that decision purported to call into question the established principles of equity, comity, and federalism which must, under appropriate circumstances, restrain a federal court from issuing such injunctions. *Id.,* at 243. These principles have been emphasized by this Court many times in the past, albeit under a variety of different rubrics. First of all, there is the doctrine, usually applicable when an injunction is sought, that a party must exhaust his available administrative remedies before invoking the equitable jurisdiction of a court. See, *e. g., Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210 (1908); *Illinois Commerce Comm'n* v. *Thomson,* 318 U. S. 675 (1943). Secondly, there is the basic principle of federalism, restated as recently as 1971 in *Younger* v. *Harris,* 401 U. S. 37, that a federal court may not enjoin a pending state criminal proceeding in the absence of special circumstances suggesting bad faith, harassment or irreparable injury that is both serious and immediate. And finally, there is the doctrine, developed in our cases at least since *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941), that when confronted with issues of constitutional dimension which implicate or depend upon unsettled questions of state law, a federal court ought to abstain and stay its proceedings until those state law questions are definitively resolved.

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[11] Title 28 U. S. C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[12] The District Court held § 2283 inapplicable in the present case because the plaintiffs sought an injunction against a state administrative body and not a state court. Whether this distinction is tenable in all circumstances—even where the administrative proceeding is adjudicatory or quasi-judicial in character—we need not decide here since the present action was brought under 42 U. S. C. § 1983.

In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion, or factfinding is involved.[13] But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U. S. C. § 1983. *McNeese* v. *Board of Education,* 373 U. S. 668 (1963); *Damico* v. *California,* 389 U. S. 416 (1967). Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of appellees' lawsuit.[14]

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[13] This exhaustion requirement does not apply generally to state "judicial," as opposed to "administrative," remedies. See *Bacon* v. *Rutland R. Co.,* 232 U. S. 134 (1914); *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24 (1934). The doctrine of exhaustion of administrative remedies should, however, be kept distinct from other equitable doctrines such as those exemplified in *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941), which do require a federal court to defer in appropriate circumstances to state *judicial* proceedings.

II

This brings us to the question of whether *Younger* v. *Harris,* 401 U. S. 37 (1971); *Samuels* v. *Mackell,* 401 U. S. 66 (1971), or the principles of equity, comity, and federalism for which those cases stand, precluded the District Court from acting, in view of the fact that proceedings against appellees were pending before the Alabama Board of Optometry. Those cases and principles would, under ordinary circumstances, forbid either a declaratory judgment or injunction with respect to the validity or enforcement of a state statute when a criminal proceeding under the statute has been commenced. Whether a like rule obtains where state civil proceedings are pending was left open in *Younger* and its companion cases.

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[14] State administrative remedies have been deemed inadequate by federal courts, and hence not subject to the exhaustion requirement, on a variety of grounds. Most often this has been because of delay by the agency, *Smith* v. *Illinois Bell Tel. Co.,* 270 U. S. 587 (1926), or because of some doubt as to whether the agency was empowered to grant effective relief, *Union Pac. R. Co.* v. *Board of Comm'rs of Weld County,* 247 U. S. 282 (1918); *McNeese* v. *Board of Education,* 373 U. S. 668 (1963). State administrative remedies have also been held inadequate, however, where the state administrative body was found to be biased or to have predetermined the issue before it. *Kelly* v. *Board of Education,* 159 F. Supp. 272 (MD Tenn. 1958).

Appellants now insist, not only that the issue is posed here by the pendency of proceedings before the state board, but also that the issue was actually decided following *Younger* by our summary affirmance in the case of *Geiger* v. *Jenkins,* 401 U. S. 985 (1971). In that case, the State Medical Board of Georgia noticed hearings on charges filed against a medical practitioner who immediately brought suit in federal court under § 1983 seeking an injunction on the ground that the underlying statute the Medical Board sought to enforce was unconstitutional. The District Court dismissed the action without reaching the merits, holding that the state proceedings were "in the nature of criminal proceedings," sufficiently so in any event to trigger the 28 U. S. C. § 2283 bar to federal intervention. 316 F. Supp. 370, 372 (ND Ga. 1970). The decision was appealed to this Court and summarily affirmed without opinion but with citation to *Younger* and *Mackell.*

As frequently occurs in the case of summary affirmance, the decision in *Geiger* is somewhat opaque. We doubt, however, that it is controlling here. First of all, it appears from the jurisdictional statement and motion to affirm in *Geiger* that state criminal proceedings were pending at the time of the challenged dismissal of the federal case. Moreover, it also appears that subsequent to that dismissal the State Medical Board completed its proceedings and revoked Geiger's license, and that judicial proceedings to review that order were already under way in the state courts. Secondly, there is no judicial finding here as there was in *Geiger* that under applicable state law license revocation proceedings are quasi-criminal in nature; nor is the Alabama case law now cited for this proposition persuasive. See *State* v. *Keel,* 33 Ala. App. 609, 35 So. 2d 625 (1948). Finally, although it is apparent from *Geiger* that administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings, there remains the claim here, not present in *Geiger,* that the administrative body itself was unconstitutionally constituted, and so not entitled to hear the charges filed against the appellees.

Unlike those situations where a federal court merely abstains from decision on federal questions until the resolution of underlying or related state law issues[15]—a subject we shall consider shortly in the context of the present case—*Younger* v. *Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger* v. *Harris* dismissal was lacking, for the appellees alleged, and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it. If the District Court's conclusion was correct in this regard, it was also correct that it need not defer to the Board. Nor, in these circumstances, would a different result be required simply because judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings.[16] Cf. *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972).

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[15] See, *e. g., Railroad Comm'n* v. *Pullman Co., supra; England* v. *Louisiana State Bd. of Medical Exam'rs,* 375 U. S. 411 (1964); *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498 (1972).

[16] This Court was assured at oral argument by counsel for both parties that Alabama law provides for *de novo* court review of delicensing orders issued by the Board. Tr. of Oral Arg. 5, 19. Nonetheless, the District Court expressly found that the revocation by the Board of appellees' licenses to practice their profession, "together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage" to the appellees for which no adequate remedy is afforded by state law. 331 F. Supp. 122, 126.

III

It is appropriate, therefore, that we consider the District Court's conclusions that the State Board of Optometry was so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of appellees' licenses to practice optometry. We affirm the District Court in this respect.

The District Court thought the Board to be impermissibly biased for two reasons. First, the Board had filed a complaint in state court alleging that appellees had aided and abetted Lee Optical Co. in the unlawful practice of optometry and also that they had engaged in other forms of "unprofessional conduct" which, if proved, would justify revocation of their licenses. These charges were substantially similar to those pending against appellees before the Board and concerning which the Board had noticed hearings following its successful prosecution of Lee Optical in the state trial court.

Secondly, the District Court determined that the aim of the Board was to revoke the licenses of all optometrists in the State who were employed by business corporations such as Lee Optical, and that these optometrists accounted for nearly half of all the optometrists practicing in Alabama. Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed against the appellees.

The District Court apparently considered either source of possible bias—prejudgment of the facts or personal interest—sufficient to disqualify the members of the Board.

Arguably, the District Court was right on both scores, but we need reach, and we affirm, only the latter ground of possible personal interest.[17]

It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. *Tumey* v. *Ohio,* 273 U. S. 510 (1927). And *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey.* It has also come to be the prevailing view that "[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators." K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited. The District Court proceeded on this basis and, applying the standards taken from our cases, concluded that the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose. As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented, we have no good reason on this record to overturn its conclusion and we affirm it.

IV

Finally, we do not think that the doctrine of abstention, as developed in our cases from *Railroad Comm'n* v.

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[17] The extent to which an administrative agency may investigate and act upon the material facts of a case and then, consistent with due process, sit as an adjudicative body to determine those facts finally has occasioned some divergence of views among federal courts. Compare *Amos Treat & Co.* v. *SEC,* 113 U. S. App. D. C. 100, 306 F. 2d 260 (1962), and *Trans World Airlines* v. *CAB,* 102 U. S. App. D. C. 391, 254 F. 2d 90 (1958), with *Pangburn* v. *CAB,* 311 F. 2d 349 (CA1 1962). See also *Mack* v. *Florida State Board of Dentistry,* 296 F. Supp. 1259 (SD Fla. 1969). We have no occasion to pass upon this issue here in view of our disposition of the present case.

Pullman Co., 312 U. S. 496 (1941), to *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498 (1972), required the District Court to stay its proceedings until the appellees had presented unsettled questions of state law to the state courts. Those questions went to the reach and effect of the state optometry law and concerned the merits of the charges pending against the appellees, at the heart of which was the issue whether Alabama law permitted licensed optometrists to be employed by business corporations and others. That central question was pending in the Alabama Supreme Court in the *Lee Optical Co.* case at the time the District Court entered its order. As was noted earlier, however, appellees here had been dismissed from that case by the state trial court, and it was only after this dismissal, and after the Board had reactivated its charges against them, that appellees sought relief in federal court.

Arguably, the District Court should have awaited the outcome of the *Lee Optical Co.* appeal, a decision which might have obviated the need for an injunction in this case.[18] But the Board was pressing its charges against appellees without awaiting that outcome and, in any event, it appears that at least some of the charges pending against appellees might have survived a reversal of the state trial court's judgment by the Alabama Supreme Court. Under these circumstances, it was not an abuse of discretion for the District Court to proceed as it did.

Nevertheless, the Alabama Supreme Court has since rendered its decision, not only in the *Lee Optical Co.* case, but also in a companion case, *House of $8.50 Eyeglasses* v. *State Board of Optometry,* 288 Ala. 349, 261 So. 2d 27 (1972). See n. 10, *supra.* Individual optometrists were parties to that latter case, and the Alabama Supreme Court entered judgment in their behalf, holding that nothing in the State's optometry law prohibited a licensed optometrist from accepting employment from a business corporation. Whether this judgment substantially devitalizes the position of the Board with respect to the appellees here, or in any way makes unnecessary or removes the "equity" from the injunction entered by the District Court, we are unable to determine. But we do think that considerations of equity, comity, and federalism warrant vacating the judgment of the District Court and remanding the case to that court for reconsideration in light of the Alabama Supreme Court's judgments in the *Lee Optical Co.* and *House of $8.50 Eyeglasses* cases. We in no way intimate whether or not the injunction should be reinstated by the District Court.

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[18] See *Askew* v. *Hargrave,* 401 U. S. 476 (1971).

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I concur, although in my view the three-judge District Court would have been better advised, as a matter of sound judicial discretion, to have refrained from acting until the outcome of the *Lee Optical* appeal. See my dissenting opinion in *Wisconsin* v. *Constantineau,* 400 U. S. 433, 443 (1971).

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring.

I join the opinion of the Court except insofar as it suggests that the question remains open whether plaintiffs in some suits brought under 42 U. S. C. § 1983 may have to exhaust administrative remedies. See *ante,* at 574–575. In my opinion, the inapplicability of the exhaustion requirement to any suit brought under § 1983 has been firmly settled by this Court's prior decisions. *McNeese* v. *Board of Education,* 373 U. S. 668, 671–672 (1963). See also *Houghton* v. *Shafer,* 392 U. S. 639 (1968); *King* v. *Smith,* 392 U. S. 309, 312 n. 4 (1968); *Damico* v. *California,* 389 U. S. 416 (1967).

KERN COUNTY LAND CO. *v.* OCCIDENTAL PETROLEUM CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-1059. Argued December 5-6, 1972—Decided May 7, 1973

During a tender-offer campaign, respondent bought more than 10% of the outstanding stock of petitioner's predecessor (Old Kern). Respondent was blocked in its takeover efforts by a defensive merger between Old Kern and Tenneco, in which Old Kern stockholders were to receive new Tenneco stock on a share-for-share basis. Less than a month after its initial tender offer, respondent thereupon negotiated a binding option to sell to Tenneco at a date over six months after the tender offer expired all the new Tenneco stock to which respondent would be entitled when the merger took place. Sale of the post-merger stock yielded respondent a profit of some $19 million, which petitioner sought to recover by a suit under § 16 (b) of the Securities Exchange Act of 1934, prohibiting profitable short-swing speculation by statutory insiders. The District Court's summary judgment for petitioner was reversed by the Court of Appeals. *Held:* The transactions, which were not based on a statutory insider's information and were not susceptible of the speculative abuse that § 16 (b) was designed to prevent, did not constitute "sales" within the meaning of that provision. Pp. 591-604.

(a) There was nothing in connection with respondent's tender-offer acquisition of Old Kern stock or the exchange thereof for the Tenneco stock that gave respondent "inside information," and once the merger, which respondent did not engineer, was approved the Old Kern-Tenneco stock exchange was involuntary. Pp. 596-600.

(b) The option agreement was not of itself a "sale"; the option was grounded on the mutual advantages to respondent as a minority stockholder that wanted to terminate an investment it had not chosen to make and Tenneco whose management did not want a potentially troublesome minority stockholder; and the option was not a source of potential speculative abuse, since respondent had no inside information about Tenneco or its new stock. Pp. 601-604.

450 F. 2d 157, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and STEWART, JJ., joined, *post,* p. 605.

David R. Hyde argued the cause for petitioner. With him on the briefs were *F. Arnold Daum, William E. Hegarty,* and *Immanuel Kohn.*

Whitney North Seymour argued the cause for respondent. With him on the brief were *Louis Nizer, Paul Martinson,* and *Bernhardt K. Wruble.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 16 (b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p (b),[1] provides that officers,

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[1] "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U. S. C. § 78p (b).

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directors, and holders of more than 10% of the listed stock of any company shall be liable to the company for any profits realized from any purchase and sale or sale and purchase of such stock occurring within a period of six months. Unquestionably, one or more statutory purchases occur when one company, seeking to gain control of another, acquires more than 10% of the stock of the latter through a tender offer made to its shareholders. But is it a § 16 (b) "sale" when the target of the tender offer defends itself by merging into a third company and the tender offeror then exchanges his stock for the stock of the surviving company and also grants an option to purchase the latter stock that is not exercisable within the statutory six-month period? This is the question before us in this case.

I

On May 8, 1967, after unsuccessfully seeking to merge with Kern County Land Co. (Old Kern),[2] Occidental Petroleum Corp. (Occidental)[3] announced an offer, to expire on June 8, 1967, to purchase on a first-come, first-served basis 500,000 shares of Old Kern common stock[4] at a price of $83.50 per share plus a brokerage commission of $1.50 per share.[5] By May 10, 1967, 500,000 shares, more than 10% of the outstanding shares of Old Kern,[6] had been tendered. On May 11, Occidental extended its offer to encompass an additional 500,000 shares. At the close of the tender offer, on June 8, 1967, Occidental owned 887,549 shares of Old Kern.[7]

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[2] Old Kern was a California corporation having substantial real estate holdings, including oil-producing lands, oil-exploration activities, cattle ranching, cattle-feeding operations, and interests in the manufacture of automotive parts, electronic systems and devices, and farm machinery and construction equipment. After the reorganization described in the text, Old Kern became known as the 600 California Corporation until its eventual dissolution under California law on October 6, 1967.

[3] Occidental is the respondent in this Court. A California corporation with its principal place of business in California, Occidental is engaged in the production and sale of oil, gas, coal, sulphur, and fertilizers.

[4] The Old Kern stock was registered pursuant to § 12 of the Securities Exchange Act of 1934, as amended, 15 U. S. C. § 78*l*. The stock was a nonexempt, equity security for purposes of § 16 (b).

Immediately upon the announcement of Occidental's tender offer, the Old Kern management undertook to frustrate Occidental's takeover attempt. A management letter to all stockholders cautioned against tender and indicated that Occidental's offer might not be the best available, since the management was engaged in merger discussions with several companies. When Occidental extended its tender offer, the president of Old Kern sent a telegram to all stockholders again advising against tender. In addition, Old Kern undertook merger discussions with Tenneco, Inc. (Tenneco),[8] and, on May 19, 1967, the Board of Directors of Old Kern announced that it had approved a merger proposal advanced by Tenneco.[9] Under the terms of the merger, Tenneco would acquire the assets, property, and goodwill of Old Kern, subject to its liabilities, through "Kern County Land Co." (New Kern),[10] a new corporation to be formed by Tenneco to receive the assets and carry on the business of Old Kern. The shareholders of Old Kern would receive a share of Tenneco cumulative convertible preference stock in exchange for each share of Old Kern common stock which they owned. On the same day, May 19, Occidental, in a quarterly report to stockholders, appraised the value of the new Tenneco stock at $105 per share.[11]

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[5] The Old Kern stock closed at 63⅝ on Friday, May 8, 1967, the last trading day prior to the announcement of the tender offer. It had reached a high of 64⅞ and a low of 57⅜ in 1967, a high of 76¼ and a low of 51¾ in 1966, a high of 71⅝ and a low of 56 in 1965, and a high of 70⅜ and a low of 56⅝ in 1964. Thus, the $85-per-share tender-offer price represented a substantial profit for shareholders of Old Kern.

[6] On May 10, Old Kern had 4,328,000 shares outstanding.

[7] On May 18, 1967, Occidental filed a Form 3, Initial Statement of Beneficial Ownership of Securities, with the Securities and Exchange Commission indicating direct ownership of 507,055 shares of Old Kern stock; on June 9, 1967, Occidental filed a Form 4, Statement of Changes in Beneficial Ownership of Securities, for the month of May, indicating the purchase of an additional 376,326 shares of Old Kern stock, for a total ownership as of May 31, 1967, of 883,381 shares. An additional 4,168 shares were purchased by June 8, 1967, so that as of June 30, 1967, Occidental held 887,549 shares of Old Kern stock. This figure included 1,900 shares which Occidental purchased on the open market in April 1967. Section 16 (b) liability is not asserted with respect to these shares, because these purchases did not make Occidental a "beneficial owner" for purposes of § 16 (b).

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[8] Tenneco, a Delaware corporation, is a diversified industrial company with operations in natural gas transmission, oil and gas, chemicals, packaging, manufacturing, and shipbuilding. Tenneco is not a party to this litigation.

[9] Although technically a sale of assets, the corporate combination has been consistently referred to by the parties as a "merger" and will be similarly denominated in this opinion. The only significance of the characterization is the fact that a sale of assets required, under California law, approval of only a majority of the Old Kern shareholders and provided no appraisal rights for dissenters.

[10] New Kern, a Delaware corporation with its principal place of business in California, is the petitioner in this Court and is a wholly owned subsidiary of Tenneco Corp. Tenneco Corp. is, in turn, a wholly owned subsidiary of Tenneco and owns all of the capital stock or controlling interests in most of Tenneco's nonpipeline operating subsidiaries. When first incorporated, New Kern was known as KCL Corp.

[11] The annual dividend of $5.50 per share on the new Tenneco stock would be more than double the current annual dividend of $2.60 per share on the Old Kern stock. Each share of the new Tenneco preference stock was convertible into 3.6 shares of Tenneco common stock. During 1967, Tenneco common stock had sold at a high of 32½ and a low of 20⅞. Moreover, in contrast to Occidental's cash offer, the Tenneco exchange was expected to be, and

Occidental, seeing its tender offer and takeover attempt being blocked by the Old Kern-Tenneco "defensive" merger, countered on May 25 and 31 with two mandamus actions in the California courts seeking to obtain extensive inspection of Old Kern books and records.[12] Realizing that, if the Old Kern-Tenneco merger were approved and successfully closed, Occidental would have to exchange its Old Kern shares for Tenneco stock and would be locked into a minority position in Tenneco, Occidental took other steps to protect itself. Between May 30 and June 2, it negotiated an arrangement with Tenneco whereby Occidental granted Tenneco Corp., a subsidiary of Tenneco, an option to purchase at $105 per share all of the Tenneco preference stock to which Occidental would be entitled in exchange for its Old Kern stock when and if the Old Kern-Tenneco merger was closed.[13] The premium to secure the option, at $10 per share, totaled $8,866,230 and was to be paid immediately upon the signing of the option agreement.[14] If the option were exercised, the premium was to be applied to the purchase price. By the terms of the option agreement, the option could not be exercised prior to Decem-

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was ultimately approved by the Internal Revenue Service as, free of capital gains tax.

[12] Prior to any court ruling on Occidental's mandamus petitions, Old Kern voluntarily permitted inspection of Old Kern's general ledger, consolidated financial statements, consolidated journal entries, details of cash receipts from oil operations, supporting trial balances, and other records over a six-day period. A list of stockholders, however, was withheld.

[13] The agreement covered 886,623 shares. This figure is 926 shares less than the number of Old Kern shares ultimately owned by Occidental. This discrepancy apparently results from uncertainty as to the number of shares tendered.

[14] An outside investment banking firm in New York had determined that between $9 and $12 per share was a fair premium on an option on the Old Kern stock.

ber 9, 1967, a date six months and one day after expiration of Occidental's tender offer. On June 2, 1967, within six months of the acquisition by Occidental of more than 10% ownership of Old Kern, Occidental and Tenneco Corp. executed the option.[15] Soon thereafter, Occidental announced that it would not oppose the Old Kern-Tenneco merger and dismissed its state court suits against Old Kern.[16]

The Old Kern-Tenneco merger plan was presented to and approved by Old Kern shareholders at their meeting on July 17, 1967. Occidental refrained from voting its Old Kern shares, but in a letter read at the meeting Occidental stated that it had determined prior to June 2 not to oppose the merger and that it did not consider the plan unfair or inequitable.[17] Indeed, Occidental indicated that, had it been voting, it would have voted in favor of the merger.

Meanwhile, the Securities and Exchange Commission had refused Occidental's request to exempt from possible § 16 (b) liability Occidental's exchange of its Old Kern stock for the Tenneco preference shares that would take place when and if the merger transaction were closed. Various Old Kern stockholders, with Occidental's interests in mind, thereupon sought to delay consummation of the merger by instituting various lawsuits in the state and federal courts.[18] These attempts were unsuccessful, however, and preparations for the merger neared completion with an Internal Revenue Service ruling that consummation of the plan would result in a tax-free exchange with no taxable gain or loss to Old Kern shareholders, and with the issuance of the necessary approval of the merger closing by the California Commissioner of Corporations.

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[15] On that date, and on the date of the exercise of the option, Old Kern common stock was selling at approximately $95 per share.

[16] Seeking to prevent its acquisition of Tenneco shares pursuant to the merger from being matched with the sale of those shares upon exercise of the option for purposes of establishing § 16 (b) liability, Occidental asked that the new Tenneco stock not be immediately registered pursuant to § 12 of the Securities Exchange Act of 1934, 15 U. S. C. § 78*l*. See 450 F. 2d 157, 160 n. 6.

[17] The letter indicated that Occidental "did not consider it to be in its best interest, or the best interest of its shareholders, or the best interest of KCL Shareholders generally for it to [oppose] the transaction." However, Occidental stated that "[i]n view of the fact that we would rather have worked out our own transaction with KCL, we shall not vote our KCL shares at the KCL Shareholder's Meeting on July 17, 1967." Under applicable California law, the abstention from voting was tantamount to opposing the merger.

The Old Kern-Tenneco merger transaction was closed on August 30. Old Kern shareholders thereupon became irrevocably entitled to receive Tenneco preference stock, share for share in exchange for their Old Kern stock. Old Kern was dissolved and all of its assets, including "all claims, demands, rights and choses in action accrued or to accrue under and by virtue of the Securities Exchange Act of 1934 . . . ," were transferred to New Kern.

The option granted by Occidental on June 2, 1967, was exercised on December 11, 1967. Occidental, not having previously availed itself of its right, exchanged certificates representing 887,549 shares of Old Kern stock for a certificate representing a like number of shares of Tenneco preference stock. The certificate was then endorsed over to the optionee-purchaser, and in return $84,229,185 was credited to Occidental's accounts at various banks. Adding to this amount the $8,886,230 premium paid in June, Occidental received $93,905,415 for its Old Kern stock (including the 1,900 shares acquired prior to issuance of its tender offer). In addition, Occidental received dividends totaling $1,793,439.22. Occidental's total profit was $19,506,419.22 on the shares obtained through its tender offer.

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[18] This history of this litigation is reviewed in *600 California Corp.* v. *Harjean Co.,* 284 F. Supp. 843 (ND Tex. 1968).

On October 17, 1967, New Kern instituted a suit under § 16 (b) against Occidental to recover the profits which Occidental had realized as a result of its dealings in Old Kern stock. The complaint alleged that the execution of the Occidental-Tenneco option on June 2, 1967, and the exchange of Old Kern shares for shares of Tenneco to which Occidental became entitled pursuant to the merger closed on August 30, 1967, were both "sales" within the coverage of § 16 (b). Since both acts took place within six months of the date on which Occidental became the owner of more than 10% of the stock of Old Kern, New Kern asserted that § 16 (b) required surrender of the profits realized by Occidental.[19] New Kern eventually moved for summary judgment, and, on December 27, 1970, the District Court granted summary judgment in favor of New Kern. *Abrams* v. *Occidental Petroleum Corp.*, 323 F. Supp. 570 (SDNY 1970). The District Court held that the execution of the option on June 2, 1967, and the exchange of Old Kern shares for shares of Tenneco on August 30, 1967, were "sales" under § 16 (b). The Court ordered Occidental to disgorge its profits plus interest. In a supplemental opinion, Occidental was also ordered to refund the dividends which it had received plus interest.

On appeal, the Court of Appeals reversed and ordered summary judgment entered in favor of Occidental. *Abrams* v. *Occidental Petroleum Corp.*, 450 F. 2d 157 (CA2 1971). The Court held that neither the option nor the exchange constituted a "sale" within the purview of

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[19] Occidental answered asserting various affirmative defenses and shareholders, and one was subsequently begun. The four suits were counterclaims. Two suits had already been instituted by Old Kern consolidated.

§ 16 (b).[20] We granted certiorari. 405 U. S. 1064 (1972). We affirm.

II

Section 16 (b) provides, *inter alia,* that a statutory insider[21] must surrender to the issuing corporation "any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security[22] of such issuer . . . within any period of less than six months." As specified in its introductory clause, § 16 (b) was enacted "[f]or the purpose of preventing the unfair use of information which may have been obtained by [a statutory insider] . . . by reason of his relationship to the issuer." Congress recognized that short-swing speculation by stockholders with advance, inside information would threaten the goal of the Securities Exchange Act to "insure the maintenance of fair and honest markets."

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[20] In view of its disposition, the Court of Appeals did not reach Occidental's contentions that only the purchases in excess of 10% of Old Kern's stock, rather than all purchases made pursuant to the tender offer, should be included in calculating liability and that the awards of prejudgment interest and dividends were improper. Occidental also appealed from the dismissal of its counterclaims. The Court of Appeals dismissed Occidental's appeal as moot.

[21] For purposes of § 16 (b), a statutory insider includes a "beneficial owner, director, or officer." 15 U. S. C. § 78p (b). The term "beneficial owner" refers to one who owns "more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* [§ 12] of this title." 15 U. S. C. § 78p (a).

[22] The term "equity security" is defined to include "any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." 15 U. S. C. § 78c (a)(11).

15 U. S. C. § 78b. Insiders could exploit information not generally available to others to secure quick profits. As we have noted, "the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." *Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U. S. 418, 422 (1972). As stated in the report of the Senate Committee, the bill aimed at protecting the public "by preventing directors, officers, and principal stockholders of a corporation . . . from speculating in the stock on the basis of information not available to others." S. Rep. No. 792, 73d Cong., 2d Sess., 9 (1934).[23]

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[23] The legislative history of § 16 (b) reveals a congressional effort to curb short-swing trading by insiders whose position gives them access to information not available to the investing public and the ability to influence corporate policy.

"Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities. Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others." S. Rep. No. 1455, 73d Cong., 2d Sess., 55 (1934).

See also 10 S. E. C. Ann. Rep. 50 (1944); S. Rep. No. 792, 73d Cong., 2d Sess., 9 (1934).

"The Securities Exchange Act of 1934 aims to protect the interests of the public against the predatory operations of directors, officers, and principal stockholders of corporations by preventing them from speculating in the stock of the corporations to which they owe a fiduciary duty. . . . By this section [16 (b)] it is rendered unlawful for persons intrusted with the administration of corporate affairs or vested with substantial control over corporations to use inside infor-

Although traditional cash-for-stock transactions that result in a purchase and sale or a sale and purchase within the six-month, statutory period are clearly within the purview of § 16 (b), the courts have wrestled with the question of inclusion or exclusion of certain "unorthodox" transactions.[24] The statutory definitions of "purchase"

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mation for their own advantage." S. Rep. No. 1455, 73d Cong., 2d Sess., 68 (1934).

The purpose and operation of § 16 (b) were explained as follows by one of its draftsmen.

"[Section 16 (b)] is to prevent directors receiving the benefits of short-term speculative swings on the securities of their own companies, because of inside information. The profit on such transaction under the bill would go to the corporation. You hold the director, irrespective of any intention or expectation to sell the security within 6 months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing." Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., pt. 15, p. 6557 (1934).

See generally Hearings on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 85 (1934); Hearings on Stock Exchange Practices, *supra,* at 6463–6581 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 7–9 (1934); S. Rep. No. 1455, 73d Cong., 2d Sess., 55–68 (1934); H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13–14 (1934). See also *Blau* v. *Lamb,* 363 F. 2d 507 (CA2 1966), cert. denied, 385 U. S. 1002 (1967); *Smolowe* v. *Delendo Corp.,* 136 F. 2d 231 (CA2), cert. denied, 320 U. S. 751 (1943); Yourd, Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act, 38 Mich. L. Rev. 133 (1939); Meeker & Cooney, The Problem of Definition in Determining Insider Liabilities Under Section 16 (b), 45 Va. L. Rev. 949 (1959); Comment, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16 (b) "Purchase or Sale?," 117 U. Pa. L. Rev. 1034 (1969).

[24] The term, see 2 L. Loss, Securities Regulation 1069 (2d ed. 1961), has been applied to stock conversions, exchanges pursuant to mergers and other corporate reorganizations, stock reclassifications, and dealings in options, rights, and warrants.

and "sale" are broad and, at least arguably, reach many transactions not ordinarily deemed a sale or purchase.[25] In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent—the realization of short-swing profits based upon access to inside information [26]—thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits. The statute requires the inside, short-swing trader to disgorge all profits realized on all "purchases" and "sales" within the specified time period, without proof of actual abuse of insider information, and without proof of intent to profit on the basis of such information. Under these strict terms, the prevailing view is to apply the statute only when its application would serve its goals. "[W]here alternative constructions of the terms of § 16 (b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders." *Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U. S., at 424. See *Blau* v. *Lamb,* 363 F. 2d 507 (CA2 1966), cert. denied, 385 U. S. 1002 (1967). Thus, "[i]n interpreting the terms 'purchase' and 'sale,' courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse." *Reliance Electric Co.* v. *Emerson Electric Co., supra,* at 424 n. 4.[27]

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[25] "When used in this chapter, unless the context otherwise requires—

. . . . .

"(13) The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire.

"(14) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of." 15 U. S. C. §§ 78c (a)(13), (14).

[26] Several decisions have been read as to apply a so-called "objective" test in interpreting and applying § 16 (b). See, *e. g.*, *Smolowe* v. *Delendo Corp., supra; Park & Tilford* v. *Schulte*, 160 F. 2d 984 (CA2), cert. denied, 332 U. S. 761 (1947); *Heli-Coil Corp.* v. *Webster*, 352 F. 2d 156 (CA3 1965). Under some broad language in those decisions, § 16 (b) is said to be applicable whether or not the transaction in question could possibly lend itself to the types of speculative abuse that the statute was designed to prevent. By far the greater weight of authority is to the effect that a "pragmatic" approach to § 16 (b) will best serve the statutory goals. See, *e. g.*, *Roberts* v. *Eaton*, 212 F. 2d 82 (CA2), cert. denied, 348 U. S. 827 (1954); *Ferraiolo* v. *Newman*, 259 F. 2d 342 (CA6 1958), cert. denied, 359 U. S. 927 (1959); *Blau* v. *Max Factor & Co.*, 342 F. 2d 304 (CA9), cert. denied, 382 U. S. 892 (1965); *Blau* v. *Lamb, supra; Petteys* v. *Butler*, 367 F. 2d 528 (CA8 1966), cert. denied, 385 U. S. 1006 (1967). For a discussion and critical appraisal of the various "approaches" to the interpretation and application of § 16 (b), see Lowenfels, Section 16 (b): A New Trend in Regulating Insider Trading, 54 Cornell L. Q. 45 (1968); Comment, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16 (b) "Purchase or Sale?," 117 U. Pa. L. Rev. 1034 (1969); Note, *Reliance Electric* and 16 (b) Litigation: A Return to the Objective Approach?, 58 Va. L. Rev. 907 (1972); Gadsby & Treadway, Recent Developments Under Section

In the present case, it is undisputed that Occidental became a "beneficial owner" within the terms of § 16 (b) when, pursuant to its tender offer, it "purchased" more than 10% of the outstanding shares of Old Kern. We must decide, however, whether a "sale" within the ambit of the statute took place either when Occidental became irrevocably bound to exchange its shares of Old Kern for shares of Tenneco pursuant to the terms of the merger agreement between Old Kern and Tenneco or

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16 (b) of the Securities Exchange Act of 1934, 17 N. Y. L. F. 687 (1971).

[27] Our differences with the dissent as to the reach and scope of congressional intent and purpose are clear. If we are mistaken, or if Congress would now mandate a different result, the statutory remedy would not be difficult to fashion.

when Occidental gave an option to Tenneco to purchase from Occidental the Tenneco shares so acquired.[28]

III

On August 30, 1967, the Old Kern-Tenneco merger agreement was signed, and Occidental became irrevocably entitled to exchange its shares of Old Kern stock for shares of Tenneco preference stock. Concededly, the transaction must be viewed as though Occidental had made the exchange on that day. But, even so, did the exchange involve a "sale" of Old Kern shares within the meaning of § 16 (b)? We agree with the Court of Appeals that it did not, for we think it totally unrealistic to assume or infer from the facts before us that Occidental either had or was likely to have access to inside information, by reason of its ownership of more than 10% of the outstanding shares of Old Kern, so as to afford it an opportunity to reap speculative, short-swing profits from its disposition within six months of its tender-offer purchases.

It cannot be contended that Occidental was an insider when, on May 8, 1967, it made an irrevocable offer to purchase 500,000 shares of Old Kern stock at a price substantially above market. At that time, it owned only 1,900 shares of Old Kern stock, far fewer than the 432,000 shares needed to constitute the 10% ownership required by the statute. There is no basis for finding that, at the time the tender offer was commenced, Occidental enjoyed an insider's opportunity to acquire information about Old Kern's affairs.

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[28] Both events occurred within six months of Occidental's first acquisition of Old Kern shares pursuant to its tender offer. Although Occidental did not exchange its Old Kern shares until December 11, 1967, it is not contended that that date, rather than the date on which Occidental became irrevocably bound to do so, should control. Similarly, although the option was not exercised until December 11, 1967, no liability is asserted with respect to that event, because it occurred more than six months after Occidental's last acquisition of Old Kern stock.

It is also wide of the mark to assert that Occidental, as a sophisticated corporation knowledgeable in matters of corporate affairs and finance, knew that its tender offer would either succeed or would be met with a "defensive merger." If its takeover efforts failed, it is argued, Occidental knew it could sell its stock to the target company's merger partner at a substantial profit. Calculations of this sort, however, whether speculative or not and whether fair or unfair to other stockholders or to Old Kern, do not represent the kind of speculative abuse at which the statute is aimed, for they could not have been based on inside information obtained from substantial stockholdings that did not yet exist. Accepting both that Occidental made this very prediction and that it would recurringly be an accurate forecast in tender-offer situations,[29] we nevertheless fail to perceive how the fruition of such anticipated events would require, or in any way depend upon, the receipt and use of inside information. If there are evils to be redressed by way of deterring those who would make tender offers,

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[29] Although a "defensive merger" is one tactic available to incumbent management in its arsenal of antitender-offer weapons, it is by no means a foregone conclusion that it is the response that will be most often, much less invariably, employed. Incumbent management might, for instance, choose to exhort shareholders not to tender, employ various techniques to elevate the market price of the company's stock in order to make the tender offer less attractive, institute legal proceedings, or increase the company's outstanding stock. Any one of these devices might prove more attractive to incumbent management than a defensive merger which could prove to be highly detrimental to the enterprise. See Note, Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers, 21 Stan. L. Rev. 1104 (1969).

§ 16 (b) does not appear to us to have been designed for this task.

By May 10, 1967, Occidental had acquired more than 10% of the outstanding shares of Old Kern. It was thus a statutory insider when, on May 11, it extended its tender offer to include another 500,000 shares. We are quite unconvinced, however, that the situation had changed materially with respect to the possibilities of speculative abuse of inside information by Occidental. Perhaps Occidental anticipated that extending its offer would increase the likelihood of the ultimate success of its takeover attempt or the occurrence of a defensive merger. But, again, the expectation of such benefits was unrelated to the use of information unavailable to other stockholders or members of the public with sufficient funds and the intention to make the purchases Occidental had offered to make before June 8, 1967.

The possibility that Occidental had, or had the opportunity to have, any confidential information about Old Kern before or after May 11, 1967, seems extremely remote. Occidental was, after all, a tender offeror, threatening to seize control of Old Kern, displace its management, and use the company for its own ends. The Old Kern management vigorously and immediately opposed Occidental's efforts. Twice it communicated with its stockholders, advising against acceptance of Occidental's offer and indicating prior to May 11 and prior to Occidental's extension of its offer, that there was a possibility of an imminent merger and a more profitable exchange. Old Kern's management refused to discuss with Occidental officials the subject of an Old Kern-Occidental merger. Instead, it undertook negotiations with Tenneco and forthwith concluded an agreement, announcing the merger terms on May 19. Requests by Occidental for inspection of Old Kern records were sufficiently frustrated by Old Kern's management to force Occidental to litigate to secure the information it desired.

There is, therefore, nothing in connection with Occidental's acquisition of Old Kern stock pursuant to its tender offer to indicate either the possibility of inside information being available to Occidental by virtue of its stock ownership or the potential for speculative abuse of such inside information by Occidental. Much the same can be said of the events leading to the exchange of Occidental's Old Kern stock for Tenneco preferred, which is one of the transactions that is sought to be classified a "sale" under § 16 (b). The critical fact is that the exchange took place and was required pursuant to a merger between Old Kern and Tenneco. That merger was not engineered by Occidental but was sought by Old Kern to frustrate the attempts of Occidental to gain control of Old Kern. Occidental obviously did not participate in or control the negotiations or the agreement between Old Kern and Tenneco. Cf. *Newmark* v. *RKO General,* 425 F. 2d 348 (CA2), cert. denied, 400 U. S. 854 (1970); *Park & Tilford* v. *Schulte,* 160 F. 2d 984 (CA2), cert. denied, 332 U. S. 761 (1947). Once agreement between those two companies crystallized, the course of subsequent events was out of Occidental's hands. Old Kern needed the consent of its stockholders, but as it turned out, Old Kern's management had the necessary votes without the affirmative vote of Occidental. The merger agreement was approved by a majority of the stockholders of Old Kern, excluding the votes to which Occidental was entitled by virtue of its ownership of Old Kern shares. See generally *Ferraiolo* v. *Newman,* 259 F. 2d 342 (CA6 1958), cert. denied, 359 U. S. 927 (1959); *Roberts* v. *Eaton,* 212 F. 2d 82 (CA2 1954). Occidental, although registering its opinion that the merger would be beneficial to Old Kern shareholders, did not in fact vote at the stockholders' meeting at which merger approval was obtained. Under California law, its abstention was tantamount to a vote against approval of the merger. Moreover, at the time of stockholder ratification of the merger, Occidental's previous dealing in Old Kern stock was, as it had always been, fully disclosed.

Once the merger and exchange were approved, Occidental was left with no real choice with respect to the future of its shares of Old Kern. Occidental was in no position to prevent the issuance of a ruling by the Internal Revenue Service that the exchange of Old Kern stock for Tenneco preferred would be tax free; and, although various lawsuits were begun in state and federal courts seeking to postpone the merger closing beyond the statutory six-month period, those efforts were futile. The California Corporation Commissioner issued the necessary permits for the closing that took place on August 30, 1967. The merger left no right in dissenters to secure appraisal of their stock. Occidental could, of course, have disposed of its shares of Old Kern for cash before the merger was closed. Such an act would have been a § 16 (b) sale and would have left Occidental with a prima facie § 16 (b) liability. It was not, therefore, a realistic alternative for Occidental as long as it felt that it could successfully defend a suit like the present one. See generally *Petteys* v. *Butler,* 367 F. 2d 528 (CA8 1966), cert. denied, 385 U. S. 1006 (1967); *Ferraiolo* v. *Newman, supra; Lynam* v. *Livingston,* 276 F. Supp. 104 (Del. 1967); *Blau* v. *Hodgkinson,* 100 F. Supp. 361 (SDNY 1951). We do not suggest that an exchange of stock pursuant to a merger may never result in § 16 (b) liability. But the involuntary nature of Occidental's exchange, when coupled with the absence of the possibility of speculative abuse of inside information, convinces us that § 16 (b) should not apply to transactions such as this one.

IV

Petitioner also claims that the Occidental-Tenneco option agreement should itself be considered a sale, either because it was the kind of transaction the statute was designed to prevent or because the agreement was an option in form but a sale in fact. But the mere execution of an option to sell is not generally regarded as a "sale." See *Booth* v. *Varian Associates,* 334 F. 2d 1 (CA1 1964), cert. denied, 379 U. S. 961 (1965); *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Industries,* 309 F. Supp. 75 (ED Wis. 1970); *Marquette Cement Mfg. Co.* v. *Andreas,* 239 F. Supp. 962 (SDNY 1965). And we do not find in the execution of the Occidental-Tenneco option agreement a sufficient possibility for the speculative abuse of inside information with respect to Old Kern's affairs to warrant holding that the option agreement was itself a "sale" within the meaning of § 16 (b). The mutual advantages of the arrangement appear quite clear. As the District Court found, Occidental wanted to avoid the position of a minority stockholder with a huge investment in a company over which it had no control and in which it had not chosen to invest. On the other hand, Tenneco did not want a potentially troublesome minority stockholder that had just been vanquished in a fight for the control of Old Kern. Motivations like these do not smack of insider trading; and it is not clear to us, as it was not to the Court of Appeals, how the negotiation and execution of the option agreement gave Occidental any possible opportunity to trade on inside information it might have obtained from its position as a major stockholder of Old Kern. Occidental wanted to get out, but only at a date more than six months thence. It was willing to get out at a price of $105 per share, a price at which it had publicly valued Tenneco preferred on May 19 when the Tenneco-Old Kern agreement was announced.

In any event, Occidental was dealing with the putative new owners of Old Kern, who undoubtedly knew more about Old Kern and Tenneco's affairs than did Occidental. If Occidental had leverage in dealing with Tenneco, it is incredible that its source was inside information rather than the fact of its large stock ownership itself.

Neither does it appear that the option agreement, as drafted and executed by the parties, offered measurable possibilities for speculative abuse. What Occidental granted was a "call" option. Tenneco had the right to buy after six months, but Occidental could not force Tenneco to buy. The price was fixed at $105 for each share of Tenneco preferred. Occidental could not share in a rising market for the Tenneco stock See *Silverman* v. *Landa,* 306 F. 2d 422 (CA2 1962). If the stock fell more than $10 per share, the option might not be exercised, and Occidental might suffer a loss if the market further deteriorated to a point where Occidental was forced to sell. Thus, the option, by its very form, left Occidental with no choice but to sell if Tenneco exercised the option, which it was almost sure to do if the value of Tenneco stock remained relatively steady. On the other hand, it is difficult to perceive any speculative value to Occidental if the stock declined and Tenneco chose not to exercise its option. See generally Note, Put and Call Options Under Section 16 of the Securities Exchange Act, 69 Yale L. J. 868 (1960); H. Filer, Understanding Put and Call Options 96–111 (1959); G. Leffler, The Stock Market 363–378 (2d ed. 1957).

The option, therefore, does not appear to have been an instrument with potential for speculative abuse, whether or not Occidental possessed inside information about the affairs of Old Kern. In addition, the option covered Tenneco preference stock, a stock as yet unissued, unregistered, and untraded. It was the value of this stock that underlay the option and that determined whether the option would be exercised, whether Occidental would be able to profit from the exercise, and whether there was any real likelihood of the exploitation of inside information. If Occidental had inside information when it negotiated and signed the option agreement, it was inside information with respect to Old Kern. Whatever it may have known or expected as to the future value of Old Kern stock, Occidental had no ownership position in Tenneco giving it any actual or presumed insights into the future value of Tenneco stock. That was the critical item of intelligence if Occidental was to use the option for purposes of speculation. Also, the date for exercise of the option was over six months in the future, a period that, under the statute itself, is assumed to dissipate whatever trading advantage might be imputed to a major stockholder with inside information. See Comment, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16 (b) "Purchase or Sale?," 117 U. Pa. L. Rev. 1034, 1054 (1969); *Silverman* v. *Landa, supra.* By enshrining the statutory period into the option, Occidental also, at least if the statutory period is taken to accomplish its intended purpose, limited its speculative possibilities. Nor should it be forgotten that there was no absolute assurance that the merger, which was not controlled by Occidental, would be consummated. In the event the merger did not close, the option itself would become null and void.

Nor can we agree that we must reverse the Court of Appeals on the ground that the option agreement was in fact a sale because the premium paid was so large as to make the exercise of the option almost inevitable, particularly when coupled with Tenneco's desire to rid itself of a potentially troublesome stockholder. The argument has force, but resolution of the question is very much a matter of judgment, economic and otherwise, and the

Court of Appeals rejected the argument. That court emphasized that the premium paid was what experts had said the option was worth, the possibility that the market might drop sufficiently in the six months following execution of the option to make exercise unlikely, and the fact that here, unlike the situation in ***Bershad*** v. ***McDonough***, 428 F. 2d 693 (CA7 1970), the optionor did not surrender practically all emoluments of ownership by executing the option. Nor did any other special circumstances indicate that the parties understood and intended that the option was in fact a sale.[30] We see no satisfactory basis or reason for disagreeing with the judgment of the Court of Appeals in this respect.[31]

The judgment of the Court of Appeals is affirmed.

So ordered.

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[30] In *Bershad* v. *McDonough*, 428 F. 2d 693 (CA7 1970), the defendants were directors and greater-than-ten-percent stockholders of Cudahy Co. The defendants, within six months of their acquisition of beneficial ownership of Cudahy, granted an option to Smelting Refining & Mining Co. to purchase their Cudahy stock. The Seventh Circuit held that the grant of the option was a § 16 (b) "sale" of the Cudahy stock. The Court of Appeals in the present case distinguished *Bershad* as follows:

"That case came before the court of appeals on a finding by the district court that, under the circumstances there presented, the stock had in fact been sold within the six months period, although the option was not formally exercised until later. The district court had relied on a number of circumstances, the most significant being that the optionor gave the optionee an irrevocable proxy to vote the shares and that the optionor and one of his associate directors resigned as directors within a few days after the grant of the option and were replaced by officers of the optionee. In other words, the district court found in effect that the 'option' was accompanied by a wink of the eye, and the court of appeals sustained this. Here there is no such finding, and no basis for one." 450 F. 2d, at 165.

[31] With respect to entering judgment for Occidental, the dissent simply has a different, but insufficiently persuasive, view of the facts from that of Judge Friendly and his colleagues.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

The Court, in resorting to an *ad hoc* analysis of the "possibility for the speculative abuse of inside information," charts a course for the interpretation of § 16 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p (b), that in my mind undermines the congressional purpose. I respectfully dissent.

I

"The statute is written broadly, and the liability it imposes is strict." *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418, 431 (DOUGLAS, J., dissenting). Except for narrowly drawn exceptions, it is all-inclusive.[1] The operative language provides:

> "[A]ny profit realized by [a beneficial owner, director, or officer] from *any purchase and sale*, or

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[1] Section 16 (b) provides in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or

> any sale and purchase, of any equity security of such issuer (other than an exempted security) *within any period of less than six months,* unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, *irrespective of any intention* on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months." (Emphasis added.)

By its own terms, the section subsumes *all* transactions that are technically purchases and sales and applies irrespective of any actual or potential use of inside information to gain a trading advantage. See *Feder* v. *Martin Marietta Corp.,* 406 F. 2d 260, 262 (CA2 1969). The conclusion seems inescapable that Occidental Petroleum Corp. (Occidental) purchased and sold shares of Kern County Land Co. (Old Kern) within a six-month period and that this "round trip" in Old Kern stock is covered by the literal terms of § 16 (b).

Occidental, pursuant to a cash tender offer, acquired in excess of 880,000 shares of Old Kern during May and June 1967. It is undisputed that these acquisitions were purchases within the meaning of the section.[2] On Au-

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the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U. S. C. § 78p (b).

[2] The term "purchase" includes "any contract to buy, purchase, or otherwise acquire." 15 U. S. C. § 78c (a)(13). A "beneficial owner" is one who owns "more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* [§ 12] of this title." 15 U. S. C. § 78p (a). The District Court held that "[t]he tender offer constituted a single act of Occidental, whereby the company became a beneficial

gust 30, 1967, Old Kern sold its assets to a newly formed subsidiary of Tenneco Corp., Kern County Land Co. (New Kern), in exchange for cumulative convertible preference stock of Tenneco, Inc. (Tenneco), Tenneco Corp.'s parent. Old Kern was dissolved in October 1967 (within six months of the tender offer), and each shareholder became irrevocably entitled to receive, share for share, for his Old Kern stock the cumulative convertible preference stock of Tenneco.

The question presented to us is whether this exchange of shares constituted a "sale" of the Old Kern shares. The term "sale," as used in the Securities Exchange Act, includes "any contract to sell or otherwise dispose of." 15 U. S. C. § 78c (a)(14). Clearly, Occidental "disposed" of its Old Kern shares through the Old Kern-Tenneco consolidation. Its status as a shareholder of Old Kern terminated, and it became instead a shareholder of Tenneco, privy to all the rights conferred by the Tenneco shares.[3] See *Newmark* v. *RKO General,* 425 F. 2d 348 (CA2 1970); *Park & Tilford* v. *Schulte,* 160 F. 2d 984 (CA2 1947).[4] In my view, we

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owner of more than 10 percent of Old Kern's capital stock." 323 F. Supp. 570, 579. Thus, the District Court ruled that the profit made on all stock purchased in the tender offer, not only the profit on the purchases in excess of 10%, would have to be surrendered. The Court of Appeals did not reach this issue.

[3] This is not a case where the stock surrendered and the stock received in the exchange were economic equivalents. Cf., *e. g., Blau* v. *Lamb,* 363 F. 2d 507, 523-525 (CA2 1966); *Blau* v. *Max Factor & Co.,* 342 F. 2d 304, 308-309 (CA9 1965).

An exchange of securities in different companies is a "purchase" or "sale" for purposes of § 10 (b). *E. g., SEC* v. *National Securities, Inc.,* 393 U. S. 453; *Dasho* v. *Susquehanna Corp.,* 380 F. 2d 262 (CA7 1967).

[4] Judge Clark, in *Park & Tilford* v. *Schulte,* adopted a straightforward approach to defining "acquisition": "Defendants did not own the common stock in question before they exercised their option to

need look no further. As my Brother BLACKMUN, then Circuit Judge, stated in dissent in *Petteys* v. *Butler,* 367 F. 2d 528, 538 (CA8 1966):

> "My own reaction is that either the statute means what it literally says or that it does not; that if the Congress intended to provide additional exceptions, it would have done so in clear language; and that the recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application. The latter inevitably is a weakening process."

The majority finesses the literal impact of § 16 (b) by examining Occidental's willfulness and its access to inside information. It concludes: "But the involuntary nature of Occidental's exchange, when coupled with the absence of the possibility of speculative abuse of inside information, convinces us that § 16 (b) should not apply to transactions such as this one." *Ante,* at 600. This approach is plainly contrary to the legislative purpose.

The purpose of § 16 (b) is stated in its preamble: "preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer . . . ." The congressional investigations that led to the enactment of the Securities Exchange Act revealed widespread use of confidential information by corporate insiders to gain an unfair advantage in trading their corporations' securities.[5] Unlike other remedial provisions

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convert; they did afterward. Therefore they acquired the stock, within the meaning of the Act." 160 F. 2d 984, 987. The same analysis holds for "disposition."

[5] Examples of this practice are chronicled elsewhere. See, *e. g., Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U. S. 418, 429–430

of the Act, the most noteworthy being § 10 (b), 15 U. S. C. § 78j (b), Congress drafted § 16 (b) as an objective rule, designed to have a clearly "prophylactic" effect. *Blau* v. *Lehman,* 368 U. S. 403, 414. See *Heli-Coil Corp.* v. *Webster,* 352 F. 2d 156, 165–166 (CA3 1965); *Smolowe* v. *Delendo Corp.,* 136 F. 2d 231, 235 (CA2 1943). As Thomas Corcoran, a principal draftsman of the Act, explained to Congress:

> "You hold the director, irrespective of any intention or expectation to sell the security within 6 months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing."[6]

In *Reliance Electric, supra,* the Court noted that "the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a *class of transactions* in which the possibility of abuse was believed to be intolerably great." 404 U. S., at 422 (emphasis added). Certainly, mergers are such a class of transactions.[7] In *Newmark* v. *RKO General, supra,* for example, RKO signed an option contract to purchase shares of the company which was to be merged into a subsidiary of RKO. When the merger was approved by the necessary parties, RKO exercised its option and the merger was consummated. The court found that RKO "not only acquired knowledge of what would tran-

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and nn. 3–6 (DOUGLAS, J., dissenting) and sources cited therein. It would serve no purpose to recount them here.

[6] Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., pt. 15, p. 6557 (1934).

[7] See Recent Cases, 84 Harv. L. Rev. 1012, 1018 (1971).

spire but also could exercise substantial influence over the course of events." 425 F. 2d, at 353. "In sum," the court concluded, "the purchase and subsequent exchange of Central shares were fraught with opportunities for the kind of speculative abuse section 16 (b) was intended to abort." *Id.*, at 354.

The Securities and Exchange Commission has resisted a rule that would exempt mergers as a class from the operation of § 16 (b). It responded as follows to a proposal of the Special Committee on Securities Regulation of the Association of the Bar of the City of New York:[8]

> "We concluded, however, that removing the 'teeth' of Section 16 (b) to discourage the use of inside information would allow insiders to create and take advantage of speculative opportunities during the time surrounding such significant corporate events which outweighed this potential conflict. Also, we know that some persons are unwittingly caught by the section in these as in other situations falling within the provisions of Section 16 (b), but in our opinion the public interest and the interest of investors are better served in this area by the unrestricted operation of the section."

It is true that in some cases an insider may be required to disgorge profits even though his transactions do not lend themselves to the abuses that underlay the enactment of § 16 (b). The draftsmen carefully weighed this eventuality and opted for a bright-line rule. As Thomas Corcoran stated: "You have to have a general rule. In particular transactions it might work a hardship, but those transactions that are a hardship represent the sacrifice to the necessity of having a general rule."[9]

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[8] Letter of Nov. 24, 1965.

[9] Hearings, *supra*, n. 6, at 6558.

The very construction of § 16 (b) reinforces the conclusion that the section is based in the first instance[10] on a totally objective appraisal of the relevant transactions.[11] See *Smolowe* v. *Delendo Corp., supra,* at 236. Had the draftsmen intended that the operation of the section hinge on abuse of access to inside information it would have been anomalous to limit the section to purchases and sales occurring within six months.[12] Indeed, the purpose of the six-month limitation, coupled with the definition of an insider, was to create a *conclusive presumption* that an insider who turns a short-swing profit in the stock of his corporation had access to inside information *and* capitalized on that information by speculating in the stock. But, the majority departs from the benign effects of this presumption when it assumes that it is "totally unrealistic to assume or infer from the facts before us that Occidental either had or was likely to have access to inside information . . . ." *Ante,* at 596. The majority abides by this assumption even for that period after which Occidental became a 10% shareholder and then extended its tender offer in order to purchase additional Old Kern shares.

The majority takes heart from those decisions of lower federal courts which endorse a "pragmatic" approach to

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[10] The objective approach may have to yield to a more flexible interpretation of the terms "purchase" and "sale" to include transactions which present the evil Congress sought to eliminate or transactions which are designed to evade § 16 (b). See discussion, *infra,* at 612–613.

[11] The preamble of the section, which expresses the purpose of the section, was intended to aid in establishing the constitutionality of the section and guiding the Commission's rulemaking authority. See *Smolowe* v. *Delendo Corp.,* 136 F. 2d 231, 236 (CA2 1943); 2 L. Loss, Securities Regulation 1041 (2d ed. 1961).

[12] In addition, there would have been no reason to exempt transactions wherein the "security was acquired in good faith in connection with a debt previously contracted . . . ."

§ 16 (b). Many involved the question whether a conversion of one security of an issuer into another security of the same issuer constituted a purchase or a sale.[13] It would serve no purpose to parse their holdings because, as Louis Loss describes, they have a "generalization-defying nature." [14] In 1966 the Securities and Exchange Commission exercised its exemptive power under § 16 (b) to adopt Rule 16b-9,[15] which under specified conditions excludes a conversion from the operation of § 16 (b). This rule will relieve the courts of much of the burden that has developed from *ad hoc* analyses in this narrow area. But, by sanctioning the approach of these cases, the majority brings to fruition Louis Loss' prophecy that they will "continue to rule us from their graves," [16] for henceforth they certainly will be applied by analogy to the area of mergers and other consolidations.

Thus, the courts will be caught up in an *ad hoc* analysis of each transaction, determining both from the economics of the transaction and the *modus operandi* of the insider whether there exists the possibility of speculative abuse of inside information. Instead of a section that is easy to administer and by its clearcut terms discourages litigation, we have instead a section that fosters litigation because the Court's decision holds out the hope for the insider that he may avoid § 16 (b) liability. In short, the majority destroys much of the section's prophylactic effect. I would be the first to agree that "[e]very transaction which can reasonably be defined as a purchase [should] be so defined, if the transaction is of a kind which can possibly lend itself to the speculation encompassed by Section 16 (b)." *Ferraiolo* v. *Newman,* 259 F. 2d 342, 345 (CA6 1958) (STEWART, J., then Circuit Judge). See also *Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U. S., at 424. Certainly we cannot allow transactions which present the possibility of abuse but do not fall within the classic conception of a purchase or sale to escape the confines of § 16 (b). It is one thing to interpret the terms "purchase" and "sale" liberally in order to include those transactions which evidence the evil Congress sought to eliminate; it is quite another to abandon the bright-line test of § 16 (b) for those transactions which clearly fall within its literal bounds. Section 16 (b), because of the six-month limitation, allows some to escape who have abused their inside information. It should not be surprising, given the objective nature of the rule, if some are caught unwillingly.

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[13] See, *e. g.*, *Roberts* v. *Eaton*, 212 F. 2d 82 (CA2 1954); *Ferraiolo* v. *Newman*, 259 F. 2d 342 (CA6 1958); *Blau* v. *Max Factor & Co.*, 342 F. 2d 304 (CA9 1965); *Blau* v. *Lamb*, 363 F. 2d 507 (CA2 1966); *Petteys* v. *Butler*, 367 F. 2d 528 (CA8 1966).

[14] 5 L. Loss, Securities Regulation 3029 (Supp. to 2d ed. 1969).

[15] Securities Exchange Act Release 7826.

[16] 5 L. Loss, Securities Regulation 3029 (Supp. to 2d ed. 1969).

In *Reliance Electric, supra,* at 422, the Court quoted with approval the following language from *Bershad* v. *McDonough,* 428 F. 2d 693, 696 (CA7 1970):

> "In order to achieve its goals, Congress chose a relatively arbitrary rule capable of easy administration. The objective standard of Section 16 (b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation. This approach maximized the ability of the rule to eradicate speculative abuses by reducing difficulties in proof. Such arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect."

It is this "objective standard" that the Court hung to so tenaciously in *Reliance Electric,* but now apparently would abandon to a large extent. In my view, the Court improperly takes upon itself the task of refashioning the contours of § 16 (b)[17] and changing its essential thrust.

II

Although I conclude that the judgment below should be reversed on the grounds that the exchange of shares constituted a sale, I could not conclude that it was proper for the Court of Appeals to direct entry of summary judgment in favor of Occidental even if I accepted the majority approach to § 16 (b). It did this notwithstanding the failure of Occidental to move for summary judgment in the District Court. To say the least, this is an extraordinary procedure.[18] Even if it can be justified in the most limited circumstances—for example, where the record below left no doubt whatsoever that the nonmoving party was entitled to summary judgment as a matter of law—this is not such a case.

The District Court concluded that "[i]n consequence of the option agreement, Occidental disposed of its holdings in Old Kern stock at a profit of about $20 per share . . . . This profit falls within the meaning and purview of Section 16 (b) . . . ." 323 F. Supp. 570, 579–580. Since the actual sale pursuant to the exercise of the option did not occur within the six-month period, the only reasonable interpretation of this conclusion of law is that the District Court found that the execution of the option was in fact and substance a sale. The majority does not contest that an option agreement may be in economic reality a sale. See *Bershad* v. *McDonough*, *supra.* It distinguishes but does not reject *Bershad.* Rather, the majority can "see no satisfactory basis or reason for disagreeing" with the Court of Appeals, which concluded that there is "no basis" for a finding that Occidental's Old Kern stock was "sold" upon execution of the option.[19] I cannot agree.

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[17] Occidental unsuccessfully sought to have the Securities and Exchange Commission adopt a rule which would have exempted this exchange. No inferences should be drawn from this refusal. But, I do believe that, given the structure and policies of § 16 (b), any "exempting" is best left to the Commission and Congress. See *Heli-Coil Corp.* v. *Webster*, 352 F. 2d 156, 165–166 (CA3 1965).

[18] See generally 6 J. Moore, Federal Practice ¶ 56.12 (2d ed. 1972).

In *Bershad,* the defendants, who had purchased approximately 18% of the outstanding shares of Cudahy Co. at $6.75 per share, executed an option obligating themselves to sell the shares at $9 per share. The market price of the shares was then $9.125. The optionee paid $350,000 (14% of the purchase price) for the option, to be applied against the purchase price in the event of exercise and forfeited in the event of nonexercise. In addition, defendants gave the optionee an irrevocable proxy with respect to the optioned stock, and defendant McDonough and his colleagues resigned from the Cudahy board of directors. The Court of Appeals also found that "[t]he circumstances of the transactions clearly indicate that the stock was effectively transferred, for all practical purposes, long before the exercise of the option." 428 F. 2d, at 698.

By comparison, the exercise price here was $105, and the premium to secure the option was $10 per share, or $8,866,230, also to be credited against the purchase price if the option were exercised and forfeited in the event of nonexercise if the merger was consummated. Thus, the effective exercise price was nearly 10% below the estimated value of the Tenneco shares to be received in the consolidation.[20] When the option was executed, Occidental's attorney was authorized to vote Occidental's Old Kern shares in favor of the Tenneco acquisition, and it was not until it was apparent that Occidental's vote was not needed that Occidental's attorney was relieved of his obligation. Occidental also abandoned its demand for two seats on Old Kern's board, as well as its litigation for inspection of Old Kern's books and records.

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[19] The Court of Appeals also concluded that the District Court had made no such finding. For the reasons indicated above, I do not agree. In any event, I presume that the Court of Appeals, had it confronted such a finding, would have determined that it was clearly erroneous.

In concluding that this case was not controlled by *Bershad*, the Court of Appeals emphasized the undisputed testimony[21] that the forfeitable down payment was a reasonable, noncoercive price. The basis for this was the deposition of one of Occidental's vice presidents stating that a New York investment firm had advised him that $9 to $12 per share was a reasonable premium for an option on stock selling at $95. This deposition should not suffice to support summary judgment. First, it is not clear what assumptions the investment firm had made in giving this advice. Second, while it may be that $10 per share premium was a reasonable price for an option based upon factors available to the general investing public, it is by no means clear that an option executed by two parties privy to inside information should be judged on the same terms.[22] It may be that under the circumstances present here the eventual exercise of the option was a "sure thing." In short, Occidental may have known that it was "locked into" a $17 million profit.[23] Finally, it has not been determined what effect, if any, the very size of the down payment—nearly $9 million—had on the eventual exercise. With these uncertainties and in view of the holding of the District Court that the option agreement constituted a sale, at the very least the case should have been remanded to the District Court for a hearing on whether the terms of the option "compelled" its exercise. See *Mourning* v. *Family Publications Service, Inc., ante,* p. 356, at 383 (DOUGLAS, J., dissenting); *White Motor Co.* v. *United States,* 372 U. S. 253, 263; 6 J. Moore, Federal Practice ¶ 56.12, p. 2243 (2d ed. 1972).

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[20] Respondent argues that, unlike *Bershad*, the effective exercise price was not below the current market value because the Old Kern shares never sold for more than $94.75. It contends that this trading price reflected the Kern board's acceptance of the proposed consolidation. But, it is common for a stock which may be exchanged to sell at a discount from the stock to be received until the exchange becomes a certainty. This discount reflects the risk that the exchange may not be consummated. The option agreement provided that the premium would be returned if there were no exchange. Thus, we must appraise this transaction on the assumption that the consolidation would be approved and accomplished.

[21] Petitioner contends here that it did not believe that it was necessary to rebut this hearsay testimony in order to prevail on its motion for summary judgment; moreover, it was not faced with a cross-motion.

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[22] Although Occidental may not have been Tenneco's "ally," as the majority indicates, it was in their mutual interest to arrange for a satisfactory option agreement.

[23] Shortly after the option was exercised, Armand Hammer, the President of Occidental, commented on the profit of $17 million that Occidental expected. In his mind, it was "not bad for two weeks' work."

GACA *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-6011. Decided May 7, 1973

Reinstatement, unopposed by Solicitor General, of *in forma pauperis* appeal that had been dismissed for failure to pay filing fee, directed in exercise of Court's supervisory powers.

Certiorari granted; vacated and remanded.

PER CURIAM.

Petitioner was convicted in United States District Court of illegal wiretapping under 18 U. S. C. § 2511. His appeal was dismissed for want of timely prosecution when he failed to pay a $25 filing fee. Petitioner contends that he thought payment of the fee unnecessary because he had been granted leave to appeal *in forma pauperis* by the District Judge.

In his memorandum before this Court, the Solicitor General states that the United States does not oppose a remand to reinstate the appeal in the exercise of this Court's supervisory powers in order to avoid possible injustice and the possibility of collateral attack upon the conviction. In light of this representation, and upon our independent examination of the record, the motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted and the case is vacated and remanded with instructions that the appeal be reinstated.

It is so ordered.

MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST dissent.

NEW JERSEY WELFARE RIGHTS ORGANIZATION ET AL. *v.* CAHILL, GOVERNOR OF NEW JERSEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 72-6258. Decided May 7, 1973

Statute limiting benefits of the "Assistance to Families of the Working Poor" program to those households in which the parents are ceremonially married and have at least one minor child of both, the natural child of one and adopted by the other, or a child adopted by both, denies equal protection to illegitimate children.

349 F. Supp. 491, reversed.

PER CURIAM.

This case presents the question of the constitutionality under the Equal Protection Clause of the Fourteenth Amendment of the New Jersey "Assistance to Families of the Working Poor" program, N. J. Stat. Ann. § 44:13-1 *et seq.*, that allegedly discriminates against illegitimate children in the provision of financial assistance and other services. Specifically, appellants challenge that aspect of the program that limits benefits to only those otherwise qualified families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both . . . ." N. J. Stat. Ann. § 44:13-3 (a). Appellants do not challenge the statute's "household" requirement. Rather, they argue that although the challenged classification turns upon the marital status of the parents as well as upon the parent-child relationship, in practical effect it operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate. Although apparently conceding the correctness of this position, the United States District Court for the District of New Jersey, sitting as a three-judge court,* upheld the statutory scheme on the ground that it was designed "to preserve and strengthen family life." 349 F. Supp. 491, 496 (1972).

Confronted with similar arguments in the past, we have specifically declared that:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972).

Thus, in *Weber* we held that under the Equal Protection Clause a State may not exclude illegitimate children from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. Similarly, in *Levy* v. *Louisiana,* 391 U. S. 68 (1968), we held that a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right. And only this Term, in *Gomez* v. *Perez,* 409 U. S. 535 (1973), we held that once a State posits a judicially enforceable right on behalf of children to needed support from their natural father, there is no constitutionally sufficient justification for denying such an essential right to illegitimate children. See also *Davis* v. *Richardson,* 342 F. Supp. 588 (Conn.), aff'd, 409 U. S. 1069 (1972); *Griffin* v. *Richardson,* 346 F. Supp. 1226 (Md.), aff'd, 409 U. S. 1069 (1972).

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*In prior proceedings in this case, a single judge of the United States District Court for the District of New Jersey, in an unreported opinion, denied appellants' petition to convene a three-judge court on the ground that no substantial constitutional question was presented, and dismissed the complaint. On appeal, the United States Court of Appeals for the Third Circuit held that a substantial constitutional claim had been presented and therefore remanded the case with directions to convene a three-judge court. 448 F. 2d 1247, 1248 (1971).

Those decisions compel the conclusion that appellants' claim of the denial of equal protection must be sustained, for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate. Accordingly, we grant the motion for leave to proceed *in forma pauperis,* reverse the judgment of the District Court, and remand for further proceedings consistent with this opinion.

THE CHIEF JUSTICE concurs in the result.

MR. JUSTICE REHNQUIST, dissenting.

The New Jersey Legislature has enacted a statute entitled "Assistance to Families of the Working Poor," which is designed to provide grants to supplement the income of a discrete class of families with children when independent sources of income are inadequate to support the family unit. The program is completely financed by the State, and therefore need not conform to any of the strictures of the Social Security Act. The New Jersey program for assistance to the working poor does not provide financial grants to classes of children as such, as is the case under various federal plans. Instead, it provides grants to classes of *families as units.* The Court holds that because benefits are limited to families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both," the legislative scheme violates the Equal Protection Clause of the Fourteenth Amendment.

The Court relies on *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972), where a Louisiana statute that denied workmen's compensation benefits to an illegitimate child was invalidated. But the very language that the Court quotes from *Weber* shows how different this case is from that. There a disability was visited solely on an illegitimate child. Here the statute distinguishes among types of families. While the classification adopted by the New Jersey Legislature undoubtedly results in denying benefits to "families" consisting of a mother and father not ceremonially married who are living with natural children, whatever denial of benefits the classification makes is imposed equally on the parents as well as the children.

Here the New Jersey Legislature has determined that special financial assistance should be given to family units that meet the statutory definition of "working poor." It does not seem to me irrational in establishing such a special program to condition the receipt of such grants on the sort of ceremonial marriage that could quite reasonably be found to be an essential ingredient of the family unit that the New Jersey Legislature is trying to protect from dissolution due to the economic vicissitudes of modern life. The Constitution does not require that special financial assistance designed by the legislature to help poor families be extended to "communes" as well.

In the area of economics and social welfare the Equal Protection Clause does not prohibit a State from taking one step at a time in attempting to overcome a social ill, provided only that the classifications made by the State are rational. Here the classification is based on a particular type of family unit, one of, if not the, core units of our social system. There being a rational basis for the legislative classification, the constitutionality of the law is governed by *Dandridge* v. *Williams,* 397 U. S. 471 (1970), rather than by *Weber.*

I would affirm the judgment of the District Court.

CITY OF BURBANK ET AL. *v.* LOCKHEED AIR TERMINAL, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–1637. Argued February 20, 1973—Decided May 14, 1973

Appellees sought an injunction against enforcement of a Burbank city ordinance placing an 11 p. m. to 7 a. m. curfew on jet flights from the Hollywood-Burbank Airport. The District Court found the ordinance unconstitutional on Supremacy Clause and Commerce Clause grounds, and the Court of Appeals affirmed on the basis of the Supremacy Clause, with respect to both pre-emption and conflict. *Held:* In light of the pervasive nature of the scheme of federal regulation of aircraft noise, as reaffirmed and reinforced by the Noise Control Act of 1972, the Federal Aviation Administration, now in conjunction with the Environmental Protection Agency, has full control over aircraft noise, pre-empting state and local control. Pp. 626–640.

457 F. 2d 667, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which STEWART, WHITE, and MARSHALL, JJ., joined, *post,* p. 640.

Richard L. Sieg, Jr., argued the cause for appellants. With him on the briefs was *Samuel Gorlick.*

Warren Christopher argued the cause for appellees. With him on the briefs was *Ralph W. Dau.*

Deputy Solicitor General Friedman argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Griswold, Assistant Attorney General Wood, Andrew L. Frey,* and *John W. Barnum. Nicholas C. Yost,* Deputy Attorney General, argued the cause for the Attorney General of California as *amicus curiae* urging reversal. With him on the brief were *Evelle J. Younger,* Attorney General, *pro se, Jay L.*

Shavelson, Assistant Attorney General, and *Larry C. King,* Deputy Attorney General.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Court in *Cooley* v. *Board of Wardens,* 12 How. 299, first stated the rule of pre-emption which is the critical issue in the present case. Speaking through Mr. Justice Curtis, it said:

> "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
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> ". . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Id.,* at 319.

This suit brought by appellees asked for an injunction against the enforcement of an ordinance adopted by the City Council of Burbank, California, which made it unlawful for a so-called pure jet aircraft to take off from the Hollywood-Burbank Airport between 11 p. m. of one day and 7 a. m. the next day, and making it unlawful for the operator of that airport to allow any such air-

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*Briefs of *amici curiae* urging affirmance were filed by *Patrick J. Falvey, Joseph Lesser, Isobel E. Muirhead,* and *Vigdor D. Bernstein* for the Port Authority of New York and New Jersey; by *Robert D. Powell* for the National Business Aircraft Association, Inc.; and by *Samuel J. Cohen* for the Air Line Pilots Association, International.

craft to take off from that airport during such periods.[1] The only regularly scheduled flight affected by the ordinance was an intrastate flight of Pacific Southwest Airlines originating in Oakland, California, and departing from Hollywood-Burbank Airport for San Diego every Sunday night at 11:30.

The District Court found the ordinance to be unconstitutional on both Supremacy Clause and Commerce Clause grounds. 318 F. Supp. 914. The Court of Appeals affirmed on the grounds of the Supremacy Clause both as respects pre-emption and as respects conflict.[2] 457 F. 2d 667. The case is here on appeal. 28 U. S. C. § 1254 (2). We noted probable jurisdiction. 409 U. S. 840. We affirm the Court of Appeals.

The Federal Aviation Act of 1958, 72 Stat. 731, 49 U. S. C. § 1301 *et seq.*, as amended by the Noise Control Act of 1972, 86 Stat. 1234, and the regulations under it, 14 CFR pts. 71, 73, 75, 77, 91, 93, 95, 97, are central to the question of pre-emption.

Section 1108 (a) of the Federal Aviation Act, 49 U. S. C. § 1508 (a), provides in part, "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . ." By §§ 307 (a), (c) of the Act, 49 U. S. C. §§ 1348 (a), (c), the Administrator of the Federal Aviation Administration (FAA) has been given broad authority to regulate the use of the navigable airspace, "in order to insure the safety of aircraft and the efficient utilization of such airspace . . ." and "for the protection of persons and property on the ground . . . ."[3]

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[1] Burbank Municipal Code § 20–32.1. The ordinance provides an exception for "emergency" flights approved by the City Police Department.

[2] The Court of Appeals held that the Burbank ordinance conflicted with the runway preference order, BUR 7100.5B, issued by the FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport. The order stated that "[p]rocedures established for the Hollywood-Burbank airport are designed to reduce community exposure to noise to the lowest practicable minimum. . . ." The Court of Appeals concluded that the ordinance "interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress." 457 F. 2d 667, 676. In view of our disposition of this appeal under the doctrine of pre-emption, we need not reach this question.

The Solicitor General, though arguing against pre-emption, concedes that as respects "airspace management" there is pre-emption. That, however, is a fatal concession, for as the District Court found: "The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme." It also found "[t]he imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace."

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[3] Section 307 provides in relevant part as follows:

"(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. . . .

. . . . .

"(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

Curfews such as Burbank has imposed would, according to the testimony at the trial and the District Court's findings, increase congestion, cause a loss of efficiency, and aggravate the noise problem. FAA has occasionally enforced curfews. See *Virginians for Dulles* v. *Volpe*, 344 F. Supp. 573. But the record shows that FAA has consistently opposed curfews, unless managed by it, in the interests of its management of the "navigable airspace."

As stated by Judge Dooling in *American Airlines* v. *Hempstead*, 272 F. Supp. 226, 230, aff'd, 398 F. 2d 369:

> "The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decibel limit for the aircraft is directly to exclude it from the lower air that it cannot use without exceeding the decibel limit."

The Noise Control Act of 1972, which was approved October 27, 1972, provides that the Administrator "after consultation with appropriate Federal, State, and local agencies and interested persons" shall conduct a study of various facets of the aircraft noise problems and report to the Congress within nine months,[4] *i. e.*, by July 1973. The 1972 Act, by amending § 611 of the Federal

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[4] Section 7 (a) provides:

"The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission stand-

Aviation Act,[5] also involves the Environmental Protection Agency (EPA) in the comprehensive scheme of federal control of the aircraft noise problem. Under the amended § 611 (b)(1), 86 Stat. 1239, 49 U. S. C. § 1431 (b)(1) (1970 ed., Supp. II), FAA, after consulting with EPA, shall provide "for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title."[6] Section 611

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ards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act."

[5] Section 611 of the Federal Aviation Act, 49 U. S. C. § 1431, was added in July 1968. Act of July 21, 1968, Pub. L. 90-411, 82 Stat. 395. Prior to amendment by the 1972 Act, it provided in part that the Administrator, "[i]n order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, . . . shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom." 49 U. S. C. § 1431 (a).

[6] Section 611 (b)(1), as amended, reads:

"In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any pro-

(b)(2), as amended, 86 Stat. 1239, 49 U. S. C. § 1431 (b)(2) (1970 ed., Supp. II), provides that future certificates for aircraft operations shall not issue unless the new aircraft noise requirements are met.[7] Section 611 (c)(1), as amended, provides that not later than July 1973 EPA shall submit to FAA proposed regulations to provide such "control and abatement of aircraft noise and sonic boom" as EPA determines is "necessary to protect the public health and welfare." FAA is directed within 30 days to publish the proposed regulations in a notice of proposed rulemaking. Within 60 days after that publication, FAA is directed to commence a public hearing on the proposed rules. Section 611 (c)(1). That subsection goes on to provide that within "a reasonable time after the conclusion of such hearing and after consultation with EPA," FAA is directed either to prescribe the regulations substantially as submitted by EPA, or prescribe them in modified form, or publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission together with its reasons therefor.

Section 611 (c)(2), as amended, also provides that if EPA believes that FAA's action with respect to a regulation proposed by EPA "does not protect the public

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vision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted."

[7] Subsection (b)(2) provides:

"The FAA shall not issue an original type certificate under section 603 (a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d)."

health and welfare from aircraft noise or sonic boom," EPA shall consult with FAA and may request FAA to review and report to EPA on the advisability of prescribing the regulation originally proposed by EPA. That request shall be published in the Federal Register; FAA shall complete the review requested and report to EPA in the time specified together with a detailed statement of FAA's findings and the reasons for its conclusion and shall identify any impact statement filed under § 102 (2)(C) of the National Environmental Policy Act of 1969,[8] 83 Stat. 853, 42 U. S. C. § 4332 (2)(c),

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[8] Section 102 reads in part as follows:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall— . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on— (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes."

Section 611 (c)(3) of the Federal Aviation Act, as amended, provides that if FAA files no statement under § 102 (2)(C) of the National Environmental Policy Act "then EPA may request the FAA to with respect to FAA's action. FAA's action, if adverse to EPA's proposal, shall be published in the Federal Register.

Congress did not leave FAA to act at large but provided in § 611 (d), as amended, particularized standards:

> "In prescribing and amending standards and regulations under this section, the FAA shall—
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> "(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;
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> "(2) consult with such Federal, State, and interstate agencies as he deems appropriate;
>
> "(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;
>
> "(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and
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> "(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section."

The original complaint was filed on May 14, 1970; the District Court entered its judgment November 30, 1970; and the Court of Appeals announced its judgment

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file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations."

and opinion March 22, 1972—all before the Noise Control Act of 1972 was approved by the President on October 27, 1972. That Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control.

There is, to be sure, no express provision of pre-emption in the 1972 Act. That, however, is not decisive. As we stated in *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230:

> "Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute."

It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption. As Mr. Justice Jackson stated, concurring in *Northwest Airlines, Inc.* v. *Minnesota,* 322 U. S. 292, 303:

> "Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds.

> They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls."

Both the Senate and House Committees included in their Reports clear statements that the bills would not change the existing pre-emption rule. The House Report stated:[9] "No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." The Senate Report stated:[10] "States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill."

These statements do not avail appellants. Prior to the 1972 Act, § 611 (a) provided that the Administrator "shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom." 82 Stat. 395. Under § 611 (b)(3) the Administrator was required to "consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest." 82 Stat. 395. When the legislation which added this section to the Federal Aviation Act[11] was considered at Senate hearings, Senator Monroney (the author of the 1958 Act) asked Secretary of Transportation Boyd whether the proposed legislation would "to any degree preempt State and local government regulation of aircraft noise and sonic boom."[12] The Secretary requested leave to submit a written opinion, and in a letter dated June 22, 1968, he stated:

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[9] H. R. Rep. No. 92-842, p. 10.

[10] S. Rep. No. 92-1160, pp. 10-11.

> "The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. . . . H. R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft."

According to the Senate Report,[13] it was "not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments," and the Report concurred in the views set forth by the Secretary in his letter.[14]

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[11] See n. 5, *supra.*

[12] Hearing before the Aviation Subcommittee of the Senate Committee on Commerce on S. 707 and H. R. 3400, Aircraft Noise Abatement Regulation, 90th Cong., 2d Sess., 29.

[13] S. Rep. No. 1353, 90th Cong., 2d Sess., 6.

[14] The letter from the Secretary of Transportation also expressed the view that "the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport,* from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the

The Senate version of the 1972 Act as it passed the Senate contained an express pre-emption section.[15] But the Senate version never was presented to the House. Instead, the Senate passed, with amendments, the House version; [16] the House, also with amendments, then concurred in the Senate amendments.[17] The Act as passed combined provisions of both the House and Senate bills on the subject that each had earlier approved. When the blended provisions of the present Act were before the House, Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, in urging the House to accept the amended version, said: [18]

> "I cannot say what industry's intention may be, but I can say to the gentleman what my intention is in trying to get this bill passed. We have evidence that across America some cities and States are trying

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airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Emphasis added.) This portion as well was quoted with approval in the Senate Report. *Ibid.*

Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.

[15] 118 Cong. Rec. 35868.

[16] *Id.*, at 35886.

[17] *Id.*, at 37075.

[18] *Id.*, at 37083.

> to pass noise regulations. Certainly we do not want that to happen. It would harass industry and progress in America. That is the reason why I want to get this bill passed during this session."

When the House approved the blended provisions of the bill, Senator Tunney moved that the Senate concur. He made clear[19] that the regulations to be considered by EPA for recommendation to FAA would include:

> "proposed means of reducing noise in airport environments through the application of emission controls on aircraft, the regulation of flight patterns and aircraft and airport operations, and *modifications in the number, frequency, or scheduling of flights* [as well as] . . . *the imposition of curfews on noisy airports,* the imposition of flight path alterations in areas where noise was a problem, the imposition of noise emission standards on new and existing aircraft—with the expectation of a retrofit schedule to abate noise emissions from existing aircraft—*the imposition of controls to increase the load factor on commercial flights, or other reductions in the joint use of airports,* and such other procedures as may be determined useful and necessary to protect public health and welfare." (Emphasis added.)

The statements by Congressman Staggers and Senator Tunney are weighty ones. For Congressman Staggers was Chairman of the House Committee on Interstate and Foreign Commerce which submitted the Noise Control Act and Report; and Senator Tunney was a member of the Senate Committee on Public Works, which submitted the Act and Report.

When the President signed the bill he stated that "many of the most significant sources of noise move in interstate commerce and can be effectively regulated only at the federal level." [20]

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[19] *Id.,* at 37317.

Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52; *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440. Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. What the ultimate remedy may be for aircraft noise which plagues many communities and tens of thousands of people is not known. The procedures under the 1972 Act are under way.[21] In addition, the Administrator has imposed a variety of regulations relating to takeoff and landing procedures and runway preferences. The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U. S. C. § 1348 (a), and the protection of persons on the ground. 49 U. S. C. § 1348 (c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." 49 U. S. C. § 1431 (d)(3). The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

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[20] 8 Weekly Comp. Pres. Docs. 1582, 1583 (Oct. 28, 1972).

[21] The Administrator has adopted regulations prescribing noise standards which must be met as a condition to type certification for all new subsonic turbojet-powered aircraft. 14 CFR pt. 36. On January 30, 1973, FAA gave advance notice of proposed rulemaking for the control of fleet noise levels (FNL) of airplanes operating in interstate commerce. 38 Fed. Reg. 2769. (The regulations would not pertain to carriers also operating in foreign commerce). The proposed rules are designed to limit FNL prior to July 1, 1978, when the covered aircraft become subject to the requirements of 14 CFR pt. 36.

The FNL would be determined as a function of the takeoff and approach noise levels of each airplane in the fleet and the number of takeoffs and landings of the fleet. Until July 1, 1976, the cumulative noise level of any fleet subject to regulation could not exceed the FNL during the previous 90-day base period. In 1976 each fleet would be required to reduce its FNL by 50% of the difference between the original base-period level and the level ultimately required by 14 CFR pt. 36.

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow.[22] The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. In 1960 FAA rejected a proposed restriction on jet operations at the Los Angeles airport between 10 p. m. and 7 a. m. because such restrictions could "create critically serious problems to all air transportation patterns." 25 Fed. Reg. 1764–1765. The complete FAA statement said:

> "The proposed restriction on the use of the airport by jet aircraft between the hours of 10 p. m. and

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[22] In order to insure efficient and safe use of the navigable airspace, FAA uses centralized "flow control," regulating the number of aircraft that will be accepted in a given area and restricting altitudes and routes that may be flown. Flow control has resulted in the Los Angeles Air Route Traffic Control Center holding aircraft on the ground at the Hollywood-Burbank Airport.

Prior to April 1970, 21 regional Air Route Traffic Control Centers exercised independent control over traffic flow in their areas. In April 1970 FAA established a Central Flow Facility to coordinate flow control throughout the Air Traffic Control system. This change was necessitated because no regional center "had enough information to make a judgment based on the overall condition of the ATC system. . . ." Fourth Annual Report of the Secretary of Transportation for Fiscal Year 1970.

> 7 a. m. under certain surface wind conditions has also been reevaluated and this provision has been omitted from the rule. The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce."

This decision, announced in 1960, remains peculiarly within the competence of FAA, supplemented now by the input of EPA. We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

Affirmed.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

The Court concludes that congressional legislation dealing with aircraft noise has so "pervaded" that field that Congress has *impliedly* pre-empted it, and therefore the ordinance of the city of Burbank here challenged is invalid under the Supremacy Clause of the Constitution. The Court says that the 1972 "Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control." *Ante,* at 633. Yet the House and Senate committee reports explicitly state that the 1972 Act to which the Court refers was *not* intended to alter the balance between state and federal regulation which had been struck by earlier congressional legislation in this area. The House Report, H. R. Rep. No. 92-842, in discussing the general pre-emptive effect of the entire bill, stated:

> "The authority of State and local government to regulate use, operation, or movement of products is not affected at all by the bill. (The preemption provision discussed in this paragraph does not apply to aircraft. See discussion of aircraft noise below.)" *Id.,* at 8.

The report went on to state specifically:

> "No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." *Id.,* at 10.

The report of the Senate Public Works Committee, S. Rep. No. 92-1160, expressed the identical intent with respect to pre-emption:

> "States and local governments are preempted from establishing or enforcing noise emission standards for aircraft [see *American Airlines* v. *Hempstead,* 272 F. Supp. 226 (EDNY 1967)], unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers

> of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." *Id.,* at 10–11.

In the light of these specific congressional disclaimers of pre-emption in the 1972 Act, reference must necessarily be had to earlier congressional legislation on the subject.[1] It was on the basis of these earlier enactments that the Court of Appeals concluded that Congress had pre-empted the field from state or local regulation of the type that the city of Burbank enacted.

The Burbank ordinance prohibited jet takeoffs from the Hollywood-Burbank Airport during the late evening and early morning hours. Its purpose was to afford local residents at least partial relief, during normal sleeping hours, from the noise associated with jet airplanes. The ordinance in no way dealt with flights over the city, cf. *American Airlines* v. *Hempstead,* 272 F. Supp. 226 (EDNY 1967), aff'd, 398 F. 2d 369 (CA2 1968), cert. denied, 393 U. S. 1017 (1969), nor did it categorically prohibit all jet takeoffs during those hours.

Appellees do not contend that the noise produced by jet engines could not reasonably be deemed to affect adversely the health and welfare of persons constantly exposed to it; control of noise, sufficiently loud to be classified as a public nuisance at common law, would be a type of regulation well within the traditional scope of the police power possessed by States and local governing bodies. Because noise regulation has traditionally been an area of local, not national, concern, in determining whether congressional legislation has, by implication, foreclosed remedial local enactments "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947). This assumption derives from our basic constitutional division of legislative competence between the States and Congress; from "due regard for the presuppositions of our embracing federal system, *including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy* . . . ." *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 243 (1959) (emphasis added). Unless the requisite pre-emptive intent is abundantly clear, we should hesitate to invalidate state and local legislation for the added reason that "the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies, Inc.* v. *Milk Control Comm'n,* 318 U. S. 261, 275 (1943).

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[1] Statements or comments of individual Senators or Representatives on the floor of either House are not to be given great, let alone controlling, weight in ascertaining the intent of Congress as a whole, see, *e. g., Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 474 (1921); *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 494, (1931); cf. *Wright* v. *Vinton Branch of Mountain Trust Bank,* 300 U. S. 440, 464 (1937). This guidance is particularly appropriate in this case, as the statements of two individual Congressmen quoted in the Court's opinion are at odds with the views expressed in the committee reports.

Since Congress' intent in enacting the 1972 Act was clearly to retain the status quo between the federal regulation and local regulation, a holding of *implied* pre-emption of the field depends upon whether two earlier congressional enactments, the Federal Aviation Act of 1958, 72 Stat. 731, 49 U. S. C. § 1301 *et seq.,* and the 1968 noise abatement amendment to that Act, 49

U. S. C. § 1431, manifested the clear intent to preclude local regulations, that our prior decisions require.

The 1958 Act was intended to consolidate in one agency in the Executive Branch the control over aviation that had previously been diffused within that branch. The paramount substantive concerns of Congress were to regulate federally all aspects of air safety, see, *e. g.*, 49 U. S. C. § 1422 and, once aircraft were in "flight," airspace management, see, *e. g.*, 49 U. S. C. § 1348 (a). See S. Rep. No. 1811, 85th Cong., 2d Sess., 5-6, 13-15. While the Act might be broad enough *to permit* the Administrator to promulgate takeoff and landing rules to avoid excessive noise at certain hours of the day, see 49 U. S. C. § 1348 (c), Congress was not concerned with the problem of noise created by aircraft and did not intend to pre-empt its regulation. Furthermore, while Congress clearly intended to pre-empt the States from regulating aircraft in flight, the author of the bill, Senator Monroney, specifically stated that FAA would not have control "over the ground space" of airports.[2]

The development and increasing use of civilian jet aircraft resulted in congressional concern over the noise associated with those aircraft. Hearings were held over a period of several years, resulting in a report but no legislation. The report of the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 36, 88th Cong., 1st Sess., shows clearly that the 1958 Act was thought by at least some in Congress neither to pre-empt local legislative action to alleviate the growing noise problem, nor to prohibit local curfews:

> "Until Federal action is taken, the local governmental authorities must be deemed to possess the

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[2] Hearings before the Subcommittee on Aviation of the Senate Committe on Interstate and Foreign Commerce (hereafter Commerce Committee), on S. 3880, Federal Aviation Agency Act, 85th Cong., 2d Sess., 279.

> police power necessary to protect their citizens and property from the unreasonable invasion of aircraft noise. The wisdom of exercising such power or the manner of the exercise is a problem to be resolved on the local governmental level.
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> . . . . .
>
> "Airports in the United States, as a general rule, are operated by a local governmental authority, either a municipality, a county, or some independent unit. These airport operators are closer, both geographically and politically, to the problem of the conflict of interests between those citizens who have been adversely affected by the aircraft noise and the needs of the community for air commerce. Some airport operators have exercised the proprietary right to restrict in a reasonable manner, the use of any runway by limiting either the hours during which it may be used or the types of civil transport aircraft that may use it." H. R. Rep. No. 36, 88th Cong., 1st Sess., 27.

Several years after the conclusion of these hearings, Congress enacted the 1968 noise abatement amendment, 82 Stat. 395, which added § 611 to the 1958 Act, 49 U. S. C. § 1431, and which was the first congressional legislation dealing with the problem of aircraft noise. On its face,[3] § 611 as added by the 1968 amendment neither pre-empted the general field of regulation of

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[3] "(a) Consultations; standards; rules and regulations.

"In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules, aircraft noise nor dealt specifically with the more limited question of curfews. The House Committee on Interstate and Foreign Commerce, after reciting the serious proportions of the problem, outlined the type of federal regulation that the Act sought to impose:

> "The noise problem is basically a conflict between two groups or interests. On the one hand, there is

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and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter.

"(b) Considerations determinative of standards, rules, and regulations.

"In prescribing and amending standards, rules, and regulations under this section, the Administrator shall—

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard, rule, or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard, rule, or regulation will contribute to carrying out the purposes of this section.

"(c) Amendment, modification, suspension, or revocation of certificate; notice and appeal rights.

"In any action to amend, modify, suspend, or revoke a certificate in which violation [of] aircraft noise or sonic boom standards, rules, or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the Administrator if it finds that control or abatement of aircraft noise or sonic boom and the public interest do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation." 49 U. S. C. § 1431.

> a group who provide various air transportation services. On the other hand there is a group who live, work, and go to schools and churches in communities near airports. The latter group is frequently burdened to the point where they can neither enjoy nor reasonably use their land because of noise resulting from aircraft operations. Many of them derive no direct benefit from the aircraft operations which create the unwanted noise. Therefore, it is easy to understand why they complain, and complain most vehemently. The possible solutions to this demanding and vexing problem which appear to offer the most promise are (1) new or modified engine and airframe designs, (2) special flight operating techniques and procedures, and (3) planning for land use in areas adjacent to airports so that such land use will be most compatible with aircraft operations. *This legislation is directed toward the primary problem; namely, reduction of noise at its source.*" (Emphasis added.) H. R. Rep. No. 1463, 90th Cong., 2d Sess., 4.

Far from indicating any total pre-emptive intent, the House Committee observed:

> "Rather, the committee expects manufacturers, air carriers, all other segments of the aviation community, and State and local civic and governmental entities to continue and increase their contributions toward the common goal of quiet." *Ibid.*

The Senate Commerce Committee's view of the House bill followed a similar vein:

> "This investment by the industry is representative of one of the avenues of approach to aircraft noise reduction, that is, the development of aircraft which generate less noise. Another approach to noise reduction is through the establishment of special flight

> operating techniques and procedures. The third principal control technique which merits serious consideration is the planning for land use in areas near airports so as to make such use compatible with aircraft operations. This is a matter largely within the province of State and local governments. While all of these techniques must be thoroughly studied and employed, the first order of business is to stop the escalation of aircraft noise by imposing standards which require the full application of noise reduction technology.
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> "A completely quiet airplane will not be developed within the foreseeable future. However, with the technological and regulatory means now at hand, it is possible to reduce both the level and the impact of aircraft noise. Within the limits of technology and economic feasibility, it is the view of the committee that the Federal Government must assure that the potential reductions are in fact realized." S. Rep. No. 1353, 90th Cong., 2d Sess., 2-3.

With specific emphasis on pre-emption, the Senate Committee observed:

> "Relation to Local Government Initiatives
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> "The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. As indicated earlier in this report, certain actions by State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.

"In this regard, we concur in the following views set forth by the Secretary in his letter to the Committee of June 22, 1968:

" 'The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines* v. *Town of Hempstead,* 272 F. Supp. 226 (U. S. D. C., E. D., N. Y., 1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H. R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

" 'However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

" 'Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft

> and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'
>
> "Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill.
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> "Finally, since the flight of aircraft has been pre-empted by the Federal Government, State and local governments can presently exercise no control over sonic boom. The bill makes no change in this regard." *Id.,* at 6–7.

In terms of pre-emption analysis, the most reasonable reading of § 611 appears to be that it was enacted to enable the Federal Government to deal with the noise problem created by jet aircraft through study and regulation of the "source" of the problem—the mechanical and structural aspects of jet and turbine aircraft design. The authority to "prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom," 49 U. S. C. § 1431 (a), while a broad grant of authority to the Administrator, cannot fairly be read as prohibiting the States from enacting every type of measure, which might have the effect of reducing aircraft noise, in the absence of a regulation to that effect under this section. The statute established exclusive federal control of the technological methods for reducing the output of noise by jet aircraft, but that is a far cry from saying that it prohibited any local regulation of the times at which the local airport might be available for the use of jet aircraft.

The Court of Appeals found critical to its decision the distinction between the local government as an airport proprietor and the local government as a regulatory agency, which was reflected in the views of the Secretary of Transportation outlined in the Senate Report on the 1968 Amendment. Under its reasoning, a local government unit that owned and operated an airport would not be pre-empted by § 611 from totally, or, as here, partially, excluding noisy aircraft from using its facilities, but a municipality having territorial jurisdiction over the airport would be pre-empted from enacting an ordinance having a similar effect. If the statute actually enacted drew this distinction, I would of course respect it. But since we are dealing with "legislative history," rather than the words actually written by Congress into law, I do not believe it is of the controlling significance attributed to it by the court below.

The pre-emption question to which the Secretary's letter was addressed related to "the field of noise regulation insofar as it involves controlling the *flight* of aircraft" (emphasis added), and thus included types of regulation quite different from that enacted by the city of Burbank that would be clearly precluded. See *American Airlines* v. *Hempstead, supra.* But more important is the highly practical consideration that the Hollywood-Burbank Airport is probably the only nonfederal airport in the country used by federally certified air carriers that is not owned and operated by a state or local government.[4] There is no indication that this fact was brought to the attention of the Senate Committee, or that the Secretary of Transportation was aware of it in framing his letter. It simply strains credulity to believe that the Secretary, the Senate Committee, or Congress intended that all airports except the Hollywood-Burbank Airport could enact curfews.

Considering the language Congress enacted into law, the available legislative history, and the light shed by these on the congressional purpose, Congress did not intend either by the 1958 Act or the 1968 Amendment to oust local governments from the enactment of regulations such as that of the city of Burbank. The 1972 Act quite clearly intended to maintain the status quo between federal and local authorities. The legislative history of the 1972 Act, quite apart from its concern with avoiding additional pre-emption, discloses a primary focus on the alteration of procedures within the Federal Government for dealing with problems of aircraft noise already entrusted by Congress to federal competence. The 1972 Act set up procedures by which the Administrator of EPA would have a role to play in the formulation and review of standards promulgated by FAA dealing with noise emissions of jet aircraft. But because these agencies have exclusive authority to reduce noise by promulgating regulations and implementing standards directed at one or several of the causes of the level of noise, local governmental bodies are not thereby foreclosed from dealing with the noise problem by every other conceivable method.

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[4] The record is not exactly clear on this point, but it does appear to be the case. Although there are several airports owned by municipalities or other governmental units that are located outside of the boundaries of the units, there does not appear to be any other privately owned airport, at which certified air carriers operate, in the country.

A local governing body that owns and operates an airport is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility. Even though the local government's decision in each case were motivated entirely because of the noise associated with airports, I do not read the Court's opinion as indicating that such action would be prohibited by the Supremacy Clause merely because the Federal Government has undertaken the responsibility for some aspects of aircraft noise control. Yet if this may be done, the Court's opinion surely does not satisfactorily explain why a local governing body may not enact a far less "intrusive" ordinance such as that of the city of Burbank.

The history of congressional action in this field demonstrates, I believe, an affirmative congressional intent to allow local regulation. But even if it did not go that far, that history surely does not reflect "the clear and manifest purpose of Congress" to prohibit the exercise of "the historic police powers of the States" which our decisions require before a conclusion of implied preemption is reached. Clearly Congress could pre-empt the field to local regulation if it chose, and very likely the authority conferred on the Administrator of FAA by 49 U. S. C. § 1431 is sufficient to authorize him to promulgate regulations effectively pre-empting local action. But neither Congress nor the Administrator has chosen to go that route. Until one of them does, the ordinance of the city of Burbank is a valid exercise of its police power.

The District Court found that the Burbank ordinance would impose an undue burden on interstate commerce, and held it invalid under the Commerce Clause for that reason. Neither the Court of Appeals nor this Court's opinion, in view of their determination as to pre-emption, reached that question. The District Court's conclusion appears to be based, at least in part, on a consideration of the effect on interstate commerce that would result if all municipal airports in the country enacted ordinances such as that of Burbank. Since the proper determination of the question turns on an evaluation of the facts of each case, see, *e. g., Bibb* v. *Navajo Freight Lines,* 359 U. S. 520 (1959), and not on a predicted proliferation of possibilities, the District Court's conclusion is of doubtful validity. The Burbank ordinance did not affect emergency flights, and had the total effect of prohibiting one scheduled commercial flight each week and several additional private flights by corporate executives; such a result can hardly be held to be an unreasonable burden on commerce. Since the Court expresses no opinion on the question, however, I refrain from any further analysis of it.[5]

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[5] Although cited by the Court, this situation is clearly not a *Cooley* situation, in which the control of aircraft noise "admit[s] only of one uniform system, or plan of regulation, [which] may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley* v. *Board of Wardens,* 12 How. 299, 319 (1852). The court below also held, but by a divided vote, that the Burbank ordinance was invalid because it was in conflict with a clearly articulated federal policy, to wit, a *non-mandatory* runway preference order of the FAA tower chief at Burbank which requested pilots to use a particular runway at night. The Court does not decide this case on that ground; I see no occasion to express in detail my views on the conflict issue, except to note my doubt as to the correctness of the disposition of that question.

UNITED STATES *v.* PENNSYLVANIA INDUSTRIAL CHEMICAL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-624. Argued March 27, 1973—Decided May 14, 1973

After the District Court refused respondent's offers of proof of reliance on Army Corps of Engineers regulations limiting violations to those impeding navigation, respondent was convicted of violating § 13 of the Rivers and Harbors Act of 1899 by discharging industrial pollutants into a navigable river. The Court of Appeals reversed on the ground that § 13 did not apply absent formalized permit procedures or, alternatively, that respondent should have been allowed to prove that it was affirmatively misled by the Corps of Engineers' regulations to believe that no permit was needed for these industrial pollutants. *Held:*

1. Section 13 prohibitions apply without regard to formalized permit procedures that it authorizes but does not mandate, and Congress did not intend to permit discharges specifically prohibited by § 13 when it enacted the 1965 and 1970 water quality acts directing States to create pollution prevention and abatement programs. Pp. 662-670.

2. Although § 13 bars all discharges of pollutants and not only those that constitute obstructions to navigation, the Corps of Engineers consistently limited its regulations to such obstructions and thus may have deprived respondent of fair warning as to what conduct the Government intended to make criminal. Pp. 670-675.

461 F. 2d 468, modified and remanded to District Court.

BRENNAN, J., delivered the opinon of the Court, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined; in Part II of which BURGER, C. J., and STEWART and POWELL, JJ., joined; and in Part I of which BLACKMUN and REHNQUIST, JJ., joined. BURGER, C. J., and STEWART and POWELL, JJ., filed a statement dissenting from Part I of the Court's opinion, *post,* p. 675. BLACKMUN and REHNQUIST, JJ., filed a statement dissenting from the judgment and Part II of the Court's opinion, *post,* p. 675.

William Bradford Reynolds argued the cause for the United States. With him on the briefs were *Solicitor*

General Griswold, Assistant Attorney General Frizzell, Deputy Assistant Attorney General Kiechel, Raymond N. Zagone, and *James R. Moore.*

Harold Gondelman argued the cause for respondent. With him on the brief was *Herbert B. Sachs.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We review here the reversal by the Court of Appeals for the Third Circuit of respondent's conviction for violation of § 13 [1] of the Rivers and Harbors Act of 1899,

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*Briefs of *amici curiae* urging affirmance were filed by *Milton A. Smith* and *Henry L. Pitts* for the Chamber of Commerce of the United States; by *David McNeil Olds* and *William Foster* for the United States Steel Corp. et al.; and by *Judd N. Poffinberger, Jr.*, for Jones & Laughlin Steel Corp.

[1] Section 13, 33 U. S. C. § 407, provides:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits

30 Stat. 1152, 33 U. S. C. § 407. Two questions are presented. The first is whether the Government may prosecute an alleged polluter under § 13 in the absence of the promulgation of a formal regulatory-permit program by the Secretary of the Army.[2] The second is whether, if the prosecution is maintainable despite the nonexistence of a formal regulatory-permit program, this respondent was entitled to assert as a defense its alleged reliance on the Army Corps of Engineers' longstanding administrative construction of § 13 as limited to water deposits that impede or obstruct navigation.

On April 6, 1971, the United States filed a criminal information against the respondent, Pennsylvania In-

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to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

Section 16 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 411, provides:

"Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction."

[2] A formal permit program under § 13 was established subsequent to the dates of the alleged violations involved in this case. See n. 9, *infra*. On October 18, 1972, Congress passed a comprehensive piece of legislation providing for national water quality standards and for a federal permit program relating to the discharge of pollutants into navigable waters. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. Section 402 of the 1972 Act, 33 U. S. C. § 1342, prohibits further issuance of permits under § 13 of the Rivers and Harbors Act of 1899 and designates the Administrator of the Environmental Protection Agency as the exclusive authority to permit discharges of pollutants into navigable waters.

dustrial Chemical Corp. (PICCO), alleging that on four separate occasions in August 1970 the corporation had discharged industrial refuse matters[3] into the Monongahela River[4] in violation of § 13 of the 1899 Act. By its terms, § 13[5] prohibits the discharge or deposit into navigable waters of "any refuse matter of any kind of description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state." The second proviso to § 13 provides, however, that "the Secretary of the Army . . . may permit the deposit"[6] of refuse matter deemed by the Army Corps of Engineers not to be injurious to navigation, "provided application is made to [the Secretary] prior to depositing such material . . . ."[7] At trial, it was stipulated that PICCO operated a manufacturing plant on the bank of the Monongahela River, that PICCO-owned concrete and iron pipes discharged the refuse matter into the river, and that PICCO had not obtained a permit from the Secretary of the Army prior to the discharges in question. PICCO argued, however, that the discharges did not violate § 13 because (1) the liquid solution flowing from its pipes was "sewage" exempt from the statutory proscription; (2) the discharge did not constitute "refuse matter" within the meaning of § 13 because it was not matter that would "impede navigation"; and (3) the term "refuse" as used in § 13 must be defined in light of the water quality standards established pursuant to the Water Pollution Control Act of 1948 and its amendments.[8] In addition, PICCO sought to introduce evidence to show that its failure to obtain a § 13 permit was excusable in this instance because prior to December 1970[9] the Army Corps of Engineers had not established a formal program for issuing permits under § 13 and, moreover, because the Corps consistently construed § 13 as limited to those deposits that would impede or obstruct navigation, thereby affirmatively misleading PICCO into believing that a § 13 permit was not required as a condition to discharges of matter involved in this case. The District Court rejected each of PICCO's arguments as to the scope and meaning of § 13, disallowed PICCO's offers of proof on the ground that they were not relevant to the issue of guilt under § 13, and instructed the jury accordingly. PICCO was convicted on all four counts and assessed the maximum fine of $2,500 on each count. 329 F. Supp. 1118 (WD Pa. 1971).

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[3] The refuse matters were identified as "iron, aluminum, and compounds containing these chemicals, and chlorides, phosphates, sulfates and solids." App. 3.

[4] The Monongahela River is a 128-mile-long, navigable waterway that flows through western Pennsylvania and northern West Virginia.

[5] Section 13 is sometimes referred to as the "Refuse Act of 1899," but that term is a post-1970 label not used by Congress, past or present. Moreover, some authors use the term to refer only to § 13, see, *e. g.*, Note, The Refuse Act of 1899: New Tasks for an Old Law, 22 Hastings L. J. 782 (1971), while others use it to refer to the entire Rivers and Harbors Act of 1899, see, *e. g.*, Rodgers, Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality, 119 U. Pa. L. Rev. 761, 766 (1971).

[6] It has been suggested that since § 13 prohibits the "discharge, or deposit" of refuse but authorizes the Secretary to permit only "the deposit" of refuse, it may be appropriate to distinguish between a "discharge" and a "deposit" and hold that only a "deposit" of refuse may be permitted by the Secretary. Hearings before the Subcommittee on the Environment of the Senate Committee on Commerce, 92d Cong., 1st Sess., 31 (1971). However, we find no support for such a distinction in either the Act itself or its legislative history.

[7] The Secretary's authority to issue permits under § 13 terminated on October 18, 1972. See n. 2, *supra*.

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[8] 62 Stat. 1155, as amended, Act of July 17, 1952, c. 927, 66 Stat. 755; Water Pollution Control Act Amendments of 1956, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91.

[9] On December 23, 1970, the President announced the establishment of a formal § 13 permit program. Executive Order 11574, 35 Fed. Reg. 19627 (Dec. 25, 1970). The Corps of Engineers followed on December 30, 1970, with proposed regulations. 35 Fed. Reg. 20005 (Dec. 31, 1970). Final regulations implementing the President's program became effective April 7, 1971. 33 CFR § 209.131 (1972). That program, with certain changes, has now become part of the new permit program authorized by § 402 of the Federal Water Pollution Control Act Amendments of 1972. See n. 2, *supra*.

On appeal, the Court of Appeals for the Third Circuit affirmed the District Court's holdings as to the application of § 13 to the matter discharged by PICCO into the river,[10] but rejected the District Court's conclusion that the § 13 prohibition was operative in the absence of formalized permit procedures. 461 F. 2d 468 (CA3 1972). The Court of Appeals reasoned that this interpretation was tantamount to reading § 13 to be an absolute prohibition against the deposit of any "foreign substance" into the navigable waters of the country and this would have had such a "drastic impact . . . on the nation's economy even in 1899," *id.*, at 473, that this interpretation could not reasonably be imputed to Congress. Instead, the Court of Appeals concluded that Congress intended to condition enforcement of § 13 on the creation and operation of an administrative permit program. The Court of Appeals stated:

> "Congress contemplated a regulatory program pursuant to which persons in PICCO's position would be able to discharge industrial refuse at the discretion of the Secretary of the Army. It intended criminal penalties for those who failed to comply with this regulatory program. Congress did not, however, intend criminal penalties for people who

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[10] This part of the Court of Appeals' decision is not before us for review. See *Brennan* v. *Arnheim & Neely*, 410 U. S. 512, 516 (1973); *NLRB* v. *International Van Lines*, 409 U. S. 48, 52 n. 4 (1972).

> failed to comply with a non-existent regulatory program." *Id.*, at 475.

The Court of Appeals seems to have found support for this interpretation of § 13 in "Congress' subsequent enactments in the water quality field." *Id.*, at 473. The court stated that "[t]here would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and section 407 of the Rivers and Harbors Act [§ 13], if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters." *Ibid.* As it viewed the matter, "[w]hat makes the two statutes compatible is the permit program contemplated by Section 13." *Ibid.* Accordingly, the Court of Appeals held that it was error for the District Court to have refused PICCO the opportunity to prove the nonexistence of a formal permit program at the time of the alleged offenses.

As an alternative ground for reversal, a majority of the Court of Appeals held that the District Court erred in disallowing PICCO's offer of proof that it had been affirmatively misled by the Corps of Engineers into believing that it was not necessary to obtain a § 13 permit for the discharge of industrial effluents such as those involved in this case. If such facts were true, the Court of Appeals stated, it would be fundamentally unfair to allow PICCO's conviction to stand.

Thus, the Court of Appeals set aside PICCO's conviction and remanded the case to the District Court to give PICCO an opportunity to present the proffered proofs that had been disallowed by the District Court.

We granted the Government's petition for certiorari. 409 U. S. 1074 (1972). We agree with the Court of Appeals that the District Court's judgment of conviction must be reversed, but we cannot agree with the Court of Appeals' interpretation of § 13 as foreclosing prosecution in the absence of the existence of a formal regulatory-permit program.

I

Section 13 creates two separate offenses: the discharge or deposit of "any refuse matter" into navigable waters (with the streets-and-sewers exception); and the deposit of "material of any kind" on the bank of any navigable waterway or tributary where it might be washed into the water and thereby impede or obstruct navigation. *La Merced,* 84 F. 2d 444, 445 (CA9 1936); *United States* v. *Consolidation Coal Co.,* 354 F. Supp. 173, 175 (ND W. Va. 1973). The second proviso to § 13 authorizes the Secretary of the Army to exempt certain water deposits from the prohibitions of § 13, "provided application is made to him prior to depositing such material." In exercising that authority, the proviso requires the Secretary to rely on the judgment of the Chief of Engineers that anchorage and navigation will not be injured by such deposits. But, even in a situation where the Chief of Engineers concedes that a certain deposit will not injure anchorage and navigation, the Secretary need not necessarily permit the deposit, for the proviso makes the Secretary's authority discretionary—*i. e.,* it provides that the Secretary "may permit" the deposit. The proviso further requires that permits issued by the Secretary are to prescribe limits and conditions, any violation of which is unlawful. It is crucial to our inquiry, however, that neither the proviso nor any other provision of the statute requires that the Secretary prescribe general regulations or set criteria governing issuance of permits.

Thus, while nothing in § 13 precludes the establishment of a formal regulatory program by the Secretary, it is equally clear that nothing in the section *requires* the establishment of such a program as a condition to rendering § 13 operative. *United States* v. *Granite State Pack-*

ing Co., 470 F. 2d 303, 304 (CA1 1972). In contrast, other provisions of the Rivers and Harbors Act of 1899,[11] do include a requirement for regulations. Consequently, we disagree with the Court of Appeals that § 13 itself precludes prosecution for violation of its provisions in the absence of a formal regulatory-permit program.

Similarly, there is nothing in the legislative history of § 13 that supports the conclusion of the Court of Appeals that such a requirement is to be read into the section. Section 13 is one section of a comprehensive law enacted in 1899 to codify pre-existing statutes designed to protect and preserve our Nation's navigable waterways. *United States* v. *Standard Oil Co.,* 384 U. S. 224, 226 (1966).

The history of the 1899 Act begins with this Court's decision in 1888 in *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1. The Court there held that there was no federal common law prohibiting obstructions and nuisances in navigable waters. In response to that decision, Congress passed a series of laws that were later reenacted as the Rivers and Harbors Act of 1899. Section 6 of the first such law, the Rivers and Harbors Act of 1890, provided in part:

> "That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever,

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[11] See § 11 of the Act, 33 U. S. C. § 404, which instructs the Secretary of the Army to establish harbor lines beyond which works may not be extended or deposits made "except under such regulations as may be prescribed from time to time by him." See also § 4 of the Rivers and Harbors Act of 1905, 33 Stat. 1147, 33 U. S. C. § 419, authorizing regulations regarding the transportation and dumping of dredging material.

> any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend or be construed to extend . . . to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby." 26 Stat. 453.

Four years later, Congress enacted the Rivers and Harbors Act of 1894. Section 6 of that Act provided in part:

> "That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy, or injure in any manner whatever any sea

> wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks . . . ." 28 Stat. 363.[12]

In 1896, Congress commissioned the Secretary of War to compile the various acts protecting navigable waters and "to submit the same to Congress . . . together with such recommendation as to revision, emendation, or enlargement of the said laws as, in his judgment, will be advantageous to the public interest." [13] The Secretary, in turn, delegated the task to the Chief of Engineers, and in February 1897, the Chief of Engineers delivered a draft proposal to the Secretary together with a cover letter that read in part:

> "I have the honor to submit herewith (1) a compilation [of the various existing laws protecting navigable waters] and (2) a draft of an act embodying such revision and enlargement of the aforesaid laws as the experience of this office has shown to be advantageous to the public interest." [14]

In his compilation, the Chief of Engineers combined the essentials of § 6 of the 1890 Act and of § 6 of the 1894 Act to form the present § 13 of the Rivers and Harbors Act of 1899. Congress enacted the compilation with virtually no debate that contains mention of the intended operative scope of § 13. It seems quite clear, however, that § 13 was intended to have no wider or narrower a scope than that of its two predecessor statutes. *United States* v. *Standard Oil Co.,* 384 U. S., at 227-228. It is true, of course, that the Chief of Engineers was authorized to recommend a "revision" or "enlargement" of the existing laws and that his cover letter accompanying the compilation referred to "a draft of an act embodying such revision and enlargement of the aforesaid laws." But the revision and enlargement were limited to "the existing law relating to the removal of wrecks,"[15] and even on that subject the changes were minor. Indeed, Senator Frye, the Chairman of the Senate Rivers and Harbors Committee, stated in response to a question whether any great change was made in the existing law by the compilation: "Oh, no. There are not ten words changed in the entire thirteen sections. It is a compilation . . . [with] [v]ery slight changes to remove ambiguities."[16]

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[12] This section of the 1894 Act, as well as § 6 of the 1890 Act, was modeled after statutes passed in 1888 and 1886 pertaining only to New York Harbor. See *United States* v. *Standard Oil Co.*, 384 U. S. 224, 226–228 (1966).

[13] Act of June 3, 1896, c. 314, § 2, 29 Stat. 234.

[14] H. R. Doc. No. 293, 54th Cong., 2d Sess. (1897).

Thus, the Court of Appeals' interpretation of § 13 has no support in the predecessor statutes of § 13. Plainly, neither of the predecessor statutes contemplated that application of their operative provisions would turn on the existence of a formal regulatory program. On the contrary, § 6 of the 1890 Act provided only that its absolute ban on the discharge of enumerated substances could not be construed "to prevent" the Secretary of War from granting, in his discretion, a permit to deposit such material into navigable waters. And § 6 of the 1894 Act contained no direct permit authorization whatsoever.[17]

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[15] *Ibid.* See 33 U. S. C. § 414.

[16] 32 Cong. Rec. 2297 (1899).

[17] It is true that § 6 of the 1894 Act prohibited discharges and deposits only "elsewhere than within the limits defined and permitted by the Secretary of War," but that language did not contemplate the establishment of a formal regulatory program by the Secretary. Section 6 of the 1890 Act granted the Secretary discretionary au-

We turn, then, to the Court of Appeals' assertion that its conclusion is supported by later congressional enactments in the water quality field. In this regard, the Court of Appeals placed primary reliance[18] on the 1965

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thority to permit nonimpeding discharges and nothing in the 1894 Act purported to curtail that earlier grant of authority to the Secretary. Thus, the reference in the 1894 provision to "limits defined and permitted by the Secretary" refers merely to the Secretary's existing permit authority under the 1890 provision.

[18] Inferentially, the Court of Appeals also referred to § 4 of the Rivers and Harbors Act of 1905, 33 U. S. C. § 419. See 461 F. 2d 468, 475 n. 7. But that provision, which was originally proposed as an amendment to § 13 of the 1899 Act and clearly contemplated the establishment of a formal regulatory program by the Secretary (although it did not require that such a program be established), provides no support for the Court of Appeals' interpretation of § 13. On the contrary, the existence of § 4 of the 1905 Act tends to confirm the conclusion that § 13 is not conditioned on the establishment of a formal regulatory program. For the legislative history of § 4 explains that it was deemed desirable to give the Secretary authority to promulgate general permissive dumping regulations as to some bodies of water (such as New York and Boston Harbors) because a large amount of illegal dumping was going on in these waters at night and it was "almost impossible to detect" the violators, thereby making it "impossible to secure convictions." 39 Cong. Rec. 3078 (1905). A formal regulatory program, in other words, was the lesser of two evils as to these bodies of water since there were insufficient facilities and personnel to effectively enforce the general prohibitions of § 13. The implication is clear, however, that had the persons responsible for the unauthorized dumping been discovered, prosecution for violation of § 13 would have been the appropriate remedy, even though then, as at the time of the present offenses, there existed no formal regulatory program under § 13.

No explanation was given by Congress for its ultimate decision to codify § 4 of the 1905 Act separately rather than as an amendment to § 13. Possibly, Congress hoped that such regulations would be issued sparingly so as not to eviscerate the broad antidumping prohibitions of § 13. In any event, the Secretary's discretionary regulatory-program authority under § 4 of the 1905 Act certainly cannot be read into § 13 as an operative requirement, and absent establishment of a regulatory program under § 4 of the 1905 Act and 1970 amendments to the Water Pollution Control Act of 1948—the Water Quality Act of 1965, 79 Stat. 903, and the Water Quality Improvement Act of 1970, 84 Stat. 91.[19] The Court of Appeals concluded that since the 1965 and 1970 Acts contemplated that discharges must meet minimum water quality standards, as set forth by state agencies, it would be "fundamentally inconsistent" to read § 13 as imposing a ban on all pollutant discharges. 461 F. 2d, at 473. We cannot agree. The Water Quality Acts were a congressional attempt to enlist state and local aid in a concentrated water pollution control and abatement program. The legislative directive of those statutes was that state and local officials, working in cooperation with federal officials, establish minimum water quality standards and create pollution prevention and abatement programs. Nothing in the statutes or their parent statute operated to permit discharges that would otherwise be prohibited by § 13, and in each case Congress specifically provided that the new statutes were not to be construed as "affecting or impairing the provisions of [§ 13 of the Rivers and Harbors Act of 1899]."[20]

Indeed, the water quality legislation expressly complements the provisions of § 13 of the 1899 Act. Section 13, although authorizing the Secretary of the Army to permit certain water deposits, contains no criteria to be followed by the Secretary in issuing such permits. The water quality legislation, on the other hand, calls for

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as to a particular body of water, the prohibitions of § 13 remain intact and completely enforceable.

[19] These statutes are to a large extent superseded by the 1972 amendments to the Water Pollution Control Act. See n. 2, *supra*.

[20] See § 11 of the Water Pollution Control Act of 1948, 62 Stat. 1161, as amended in 1956, 70 Stat. 507, as further amended by the Water Quality Act of 1965, 79 Stat. 903, and as further amended by the Water Quality Improvement Act of 1970, 84 Stat. 113.

the setting of minimum water quality standards, and once such standards are established, federal permit authority, such as that vested in the Secretary of the Army by the second proviso to § 13, is specifically limited to that extent—*i. e.,* a permit could not be granted by the Secretary unless the discharge material met the applicable standards. Water Quality Improvement Act of 1970, § 103, 84 Stat. 107. In essence, therefore, the Water Quality Acts placed a limitation on the Secretary's permit authority without undermining the general prohibitions of § 13. See *United States* v. *Maplewood Poultry Co.,* 327 F. Supp. 686, 688 (Me. 1971); *United States* v. *United States Steel Corp.,* 328 F. Supp. 354, 357 (ND Ind. 1970); *United States* v. *Interlake Steel Corp.,* 297 F. Supp. 912, 916 (ND Ill. 1969).

We, therefore, find nothing fundamentally inconsistent between § 13 and the subsequent federal enactments in the water quality field. Section 13 declares in simple absolutes that have been characterized as "almost an insult to the sophisticated wastes of modern technology" [21] that "[i]t shall not be lawful" to discharge or deposit into navigable waters of the United States "any refuse matter of any kind or description whatever" except as permitted by the Secretary of the Army. In enacting subsequent legislation in the water quality field, Congress took special precautions to preserve the broad prohibitions of § 13 and in no way implied that those prohibitions were operative only under a formal regulatory-permit program. Similarly, nothing in the language or history of § 13 conditions enforcement of its prohibitions on the establishment of a formal regulatory-permit program and, as we have said in the past, "the history of this provision and of related legislation dealing with our free-flowing rivers 'forbids a narrow, cramped reading' of § 13." *United States* v. *Standard Oil Co.*, 384 U. S., at 226; *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491 (1960).

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[21] Rodgers, Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality, 119 U. Pa. L. Rev. 761, 766 (1971).

II

We turn, therefore, to the Court of Appeals' alternative ground for reversing PICCO's conviction, namely, that in light of the longstanding, official administrative construction of § 13 as limited to those water deposits that tend to impede or obstruct navigation, PICCO may have been "affirmatively misled" into believing that its conduct was not criminal.[22] We agree with the Court of Appeals that PICCO should have been permitted to present relevant evidence to establish this defense.

At the outset, we observe that the issue here is not whether § 13 in fact applies to water deposits that have no tendency to affect navigation. For, although there was much dispute on this question in the past,[23] in

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[22] It was conceded for purposes of this case that the refuse matter involved was not of a nature that would impede or obstruct navigation. 461 F. 2d, at 478. See also n. 3, *supra*.

[23] The seeming ambiguity of the language of § 13 and the sparse legislative history of that provision caused the lower courts to disagree over the years as to the proper scope of § 13. The second clause of § 13, which prohibits the deposit of refuse on the "bank" of any navigable water or tributary where such refuse may be washed into the water, is expressly limited to deposits that shall or may impede or obstruct navigation. The first clause of § 13, however, which is set off from the second clause by a semicolon, contains no language of its own limiting its prohibition to navigation-impeding deposits. Similarly, in regard to the two predecessor statutes of § 13, § 6 of the 1890 Act was expressly limited to navigation-impeding deposits, but § 6 of the 1894 Act was not. And the legislative history of § 13 and its predecessor statutes is hardly conclusive on this issue. But see Comment, Discharging New Wine into Old Wineskins: The Meta-

United States v. *Standard Oil Co., supra,* we held that "the 'serious injury' to our watercourses . . sought to be remedied [by the 1899 Act] was caused in part by obstacles that impeded navigation and in part by pollution," and that the term "refuse" as used in § 13 "includes all foreign substances and pollutants . . . ." 384 U. S., at 228–229, 230.[24] See also *Illinois* v. *City of Milwaukee,* 406 U. S. 91, 101 (1972). Since then, the lower courts have almost universally agreed, as did the courts below, that § 13 is to be read in accordance with its plain language as imposing a flat ban on the unauthorized deposit of foreign substances into navigable waters, regardless of the effect on navigation. See, *e. g., United States* v. *Granite State Packing Co.,* 343 F. Supp. 57, aff'd, 470 F. 2d 303 (CA1 1972); *United States* v. *Esso Standard Oil Co. of Puerto Rico,* 375 F. 2d 621 (CA3 1967); *United States* v. *Consolidation Coal Co.,* 354 F. Supp. 173 (ND W. Va. 1973); *United States* v. *Genoa Cooperative Creamery Co.,* 336 F. Supp. 539 (WD Wis. 1972); *United States* v. *Maplewood Poultry Co.,* 327 F. Supp. 686

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morphosis of the Rivers and Harbors Act of 1899, 33 U. Pitt. L. Rev. 483 (1972).

See as construing § 13 to be applicable to all water deposits regardless of their tendency to obstruct or impede navigation, *La Merced,* 84 F. 2d 444 (CA9 1936); *The President Coolidge,* 101 F. 2d 638 (CA9 1939); *United States* v. *Ballard Oil Co. of Hartford,* 195 F. 2d 369 (CA2 1952). See as construing § 13 to be applicable only to navigation-impeding deposits, *United States* v. *Crouch* (1922) (unreported, see *United States* v. *Standard Oil Co.,* 384 U. S., at 229 n. 5); *Warner-Quinlan Co.* v. *United States,* 273 F. 503 (CA3 1921); *Nicroli* v. *Den Norske Afrika-Og Australielinie,* 332 F. 2d 651 (CA2 1964).

[24] *Standard Oil* involved an accidental discharge of aviation gasoline into navigable waters . The District Court had made the finding that the gasoline "was not such as to impede navigation." *United States* v. *Standard Oil Co.,* No. 291, O. P. 1965, App. 8–11.

(Me. 1971); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354 (ND Ind. 1970); *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912 (ND Ill. 1969); contra, *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140 (ND Ala. 1971), aff'd, 456 F. 2d 1294 (CA5 1972).

Nevertheless, it is undisputed that prior to December 1970 the Army Corps of Engineers consistently construed § 13 as limited to water deposits that affected navigation. Thus, at the time of our decision in *Standard Oil*, the published regulation pertaining to § 13 read as follows:

> "§ 209.395. *Deposit of refuse.* Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U. S. C. 407), prohibits the deposit in navigable waters generally of 'refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.' The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation. Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation." 33 CFR § 209.395 (1967).

In December 1968, the Corps of Engineers published a complete revision of the regulations pertaining to navigable waters. The new regulations pertaining to §§ 9 and 10 of the Rivers and Harbors Act of 1899, 33 U. S. C. §§ 401 and 403, dealing with construction and excavation in navigable waters, stated for the first time that the Corps would consider pollution and other conservation and environmental factors in passing on applications under those sections for permits to "work in navigable waters." 33 CFR § 209.120 (d) (1969). But notwithstanding this reference to environmental factors and in spite of our intervening decision in *Standard Oil,* the new regulation pertaining to § 13 of the 1899 Act continued to construe that provision as limited to water deposits that affected navigation:

> "Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U. S. C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U. S. C. 419). As a means of assisting the Chief of Engineers in determining the effect on anchorage of vessels, the views of the U. S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District." 33 CFR § 209.200 (e)(2) (1969).[25]

At trial, PICCO offered to prove that, in reliance on the consistent, longstanding administrative construction of § 13, the deposits in question were made in good-faith belief that they were permissible under law. PICCO does not contend, therefore, that it was ignorant of the law or that the statute is impermissibly vague, see *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), but rather that it was affirmatively misled by the responsible administrative agency into believing that the law did not apply in this situation. Cf. *Raley* v. *Ohio*, 360 U. S. 423 (1959); *Cox* v. *Louisiana*, 379 U. S. 559 (1965).

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[25] Section 4 of the Rivers and Harbors Act of 1905 authorizes the Secretary of the Army to prescribe regulations to govern the transportation and dumping into navigable waters of dredgings, earth, garbage, and other refuse matter whenever in his judgment such regulations are required "in the interest of navigation." 33 U. S. C. § 419. Thus, the reference to that provision in the Corps' revised regulation did not signify a change in the Corps' construction of § 13.

Of course, there can be no question that PICCO had a right to look to the Corps of Engineers' regulations for guidance. The Corps is the responsible administrative agency under the 1899 Act, and "the rulings, interpretations and opinions of the [responsible agency] . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which . . . litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944); *Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 499 (1958). Moreover, although the regulations did not of themselves purport to create or define the statutory offense in question, see *United States* v. *Mersky*, 361 U. S. 431 (1960), it is certainly true that their designed purpose was to guide persons as to the meaning and requirements of the statute. Thus, to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution. See Newman, Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law, 53 Col. L. Rev. 374 (1953); Note, Applying Estoppel Principles in Criminal Cases, 78 Yale L. J. 1046 (1969).

The Government argues, however, that our pronouncement in *Standard Oil* precludes PICCO from asserting reliance on the Corps of Engineers' regulations and that, in any event, the revised regulation issued in 1968, when considered in light of other pertinent factors,[26] was not misleading to persons in PICCO's position. But we need not respond to the Government's arguments here, for the substance of those arguments pertains, not to the issue of the availability of reliance as a defense, but rather to the issues whether there was in fact reliance and, if so, whether that reliance was reasonable under the circumstances—issues that must be decided in the first instance by the trial court. At this stage, it is sufficient that we hold that it was error for the District Court to refuse to permit PICCO to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute.

Accordingly, the judgment of the Court of Appeals is modified to remand the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL dissent in part, because they agree with the Court of Appeals that the respondent on remand should also be given the opportunity to prove the nonexistence of a permit program at the time of the alleged offenses.

MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST agree with Part I, but believing that the Court's opinion and judgment in *United States* v. *Standard Oil Co.,* 384

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[26] The other factors that the Government argues must be taken into consideration are post-1968 regulations issued with respect to other sections of the 1899 Act and with respect to other acts, and certain Corps of Engineers press releases and periodic publications. Brief for United States 35–38.

U. S. 224 (1966), make absolutely clear the meaning and reach of § 13 with respect to PICCO's industrial discharge into the Monongahela River; that subsequent reliance upon any contrary administrative attitude on the part of the Corps of Engineers, express or by implication, is unwarranted; and that the District Court was correct in rejecting PICCO's offer of proof of reliance as irrelevant, would reverse the Court of Appeals with directions to reinstate the judgment of conviction.

FRONTIERO ET VIR *v.* RICHARDSON, SECRETARY OF DEFENSE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 71-1694. Argued January 17, 1973—Decided May 14, 1973

A married woman Air Force officer (hereafter appellant) sought increased benefits for her husband as a "dependent" under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076. Those statutes provide, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support. When her application was denied for failure to satisfy the statutory dependency standard, appellant and her husband brought this suit in District Court, contending that the statutes deprived servicewomen of due process. From that Court's adverse ruling, they took a direct appeal. *Held:* The judgment is reversed. Pp. 682-691; 691-692.

341 F. Supp. 201, reversed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, concluded that 37 U. S. C. §§ 401, 403 and 10 U. S. C. §§ 1072, 1076, as inherently suspect statutory classifications based on sex, are so unjustifiably discriminatory as to violate the Due Process Clause of the Fifth Amendment. Pp. 682-691.

MR. JUSTICE STEWART concluded that the challenged statutes work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed,* 404 U. S. 71. P. 691.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, while agreeing that the statutes deprive servicewomen of due process, concluded that in the light of *Reed* v. *Reed,* 404 U. S. 71, and the fact that the Equal Rights Amendment has been submitted to the States for ratification, it is inappropriate to decide at this time whether sex is a suspect classification. Pp. 691-692.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined. STEWART, J., filed a statement concurring in the judgment, *post,* p. 691. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and BLACKMUN, J., joined, *post,* p. 691. REHNQUIST, J., filed a dissenting statement, *post,* p. 691.

Joseph J. Levin, Jr., argued the cause for appellants. With him on the brief was *Morris S. Dees, Jr.*

Samuel Huntington argued the cause for appellees. On the brief were *Solicitor General Griswold, Assistant Attorney General Wood,* and *Mark L. Evans.*

Ruth Bader Ginsburg argued the cause for the American Civil Liberties Union as *amicus curiae* urging reversal. With her on the brief was *Melvin L. Wulf.*

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join.

The question before us concerns the right of a female member of the uniformed services[1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U. S. C. § 401 (1); 10 U. S. C. § 1072 (2)(A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support. 37 U. S. C. § 401; 10 U. S. C. § 1072 (2)(C).[2] Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction. 341 F. Supp. 201 (1972). We noted probable jurisdiction. 409 U. S. 840 (1972). We reverse.

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[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U. S. C. § 101 (3); 10 U. S. C. § 1072 (1).

I

In an effort to attract career personnel through reenlistment, Congress established, in 37 U. S. C. § 401 *et seq.*, and 10 U. S. C. § 1071 *et seq.*, a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry.[3] Thus, under 37 U. S. C. § 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters" and, under 10 U. S. C. § 1076, a member's dependents are provided comprehensive medical and dental care.

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[2] Title 37 U. S. C. § 401 provides in pertinent part:

"In this chapter, 'dependent,' with respect to a member of a uniformed service, means—

"(1) his spouse;

. . . . .

"However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. . . ."

Title 10 U. S. C. § 1072 (2) provides in pertinent part:

" 'Dependent,' with respect to a member . . . of a uniformed service, means—

"(A) the wife;

. . . . .

"(C) the husband, if he is in fact dependent on the member . . . for over one-half of his support . . . ."

[3] See 102 Cong. Rec. 3849–3850 (Cong. Kilday), 8043 (Sen. Saltonstall); 95 Cong. Rec. 7662 (Cong. Kilday), 7664 (Cong. Short), 7666 (Cong. Havenner), 7667 (Cong. Bates), 7671 (Cong. Price). See also 10 U. S. C. § 1071.

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her "dependent." Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-half of his support.[4] Appellants then commenced this suit, contending that, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment.[5] In essence, appellants asserted that the discriminatory impact of the statutes is twofold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent injunction against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

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[4] Appellant Joseph Frontiero is a full-time student at Huntingdon College in Montgomery, Alabama. According to the agreed stipulation of facts, his living expenses, including his share of the household expenses, total approximately $354 per month. Since he receives $205 per month in veterans' benefits, it is clear that he is not dependent upon appellant Sharron Frontiero for more than one-half of his support.

[5] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk,* 377 U. S. 163, 168 (1964); see *Shapiro* v. *Thompson,* 394 U. S. 618, 641-642 (1969); *Bolling* v. *Sharpe,* 347 U. S. 497 (1954).

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members,[6] a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family—and the wife typically the "dependent" partner—"it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members." 341 F. Supp., at 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District

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[6] The housing provisions, set forth in 37 U. S. C. § 401 *et seq.*, were enacted as part of the Career Compensation Act of 1949, which established a uniform pattern of military pay and allowances, consolidating and revising the piecemeal legislation that had been developed over the previous 40 years. See H. R. Rep. No. 779, 81st Cong., 1st Sess.; S. Rep. No. 733, 81st Cong., 1st Sess. The Act apparently retained in substance the dependency definitions of § 4 of the Pay Readjustment Act of 1942 (56 Stat. 361), as amended by § 6 of the Act of September 7, 1944 (58 Stat. 730), which required a female member of the service to demonstrate her spouse's dependency. It appears that this provision was itself derived from unspecified earlier enactments. See S. Rep. No. 917, 78th Cong., 2d Sess., 4.

The medical benefits legislation, 10 U. S. C. § 1071 *et seq.*, was enacted as the Dependents' Medical Care Act of 1956. As such, it was designed to revise and make uniform the existing law relating to medical services for military personnel. It, too, appears to have carried forward, without explanation, the dependency provisions found in other military pay and allowance legislation. See H. R. Rep. No. 1805, 84th Cong., 2d Sess.; S. Rep. No. 1878, 84th Cong., 2d Sess.

Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower." *Ibid.*

II

At the outset, appellants contend that classifications based upon sex, like classifications based upon race,[7] alienage,[8] and national origin,[9] are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in *Reed* v. *Reed,* 404 U. S. 71 (1971).

In *Reed,* the Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. Appellant, the mother of the deceased, and appellee, the father, filed competing petitions for appointment as administrator of their son's estate. Since the parties, as parents of the deceased, were members of the same entitlement class, the statutory preference was invoked and the father's petition was therefore granted. Appellant claimed that this statute, by giving a mandatory preference to males over females without regard to their individual qualifications, violated the Equal Protection Clause of the Fourteenth Amendment.

The Court noted that the Idaho statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." 404 U. S., at 75. Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. See *Jefferson* v. *Hackney,* 406 U. S. 535, 546 (1972); *Richardson* v. *Belcher,* 404 U. S. 78, 81 (1971); *Flemming* v. *Nestor,* 363 U. S. 603, 611 (1960); *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961); *Dandridge* v. *Williams,* 397 U. S. 471, 485 (1970).

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[7] See *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida,* 379 U. S. 184, 191–192 (1964); *Bolling* v. *Sharpe, supra,* at 499.

[8] See *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971).

[9] See *Oyama* v. *California,* 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943).

In an effort to meet this standard, appellee contended that the statutory scheme was a reasonable measure designed to reduce the workload on probate courts by eliminating one class of contests. Moreover, appellee argued that the mandatory preference for male applicants was in itself reasonable since "men [are] as a rule more conversant with business affairs than . . . women."[10] Indeed, appellee maintained that "it is a matter of common knowledge, that women still are not engaged in politics, the professions, business or industry to the extent that men are."[11] And the Idaho Supreme Court, in upholding the constitutionality of this statute, suggested that the Idaho Legislature might reasonably have "concluded that in general men are better qualified to act as an administrator than are women."[12]

Despite these contentions, however, the Court held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." 404 U. S., at 77. The Court therefore held that, even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." *Id.*, at 76. This departure from "traditional" rational-basis analysis with respect to sex-based classifications is clearly justified.

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[10] Brief for Appellee in No. 70-4, O. T. 1971, *Reed* v. *Reed,* p. 12.

[11] *Id.,* at 12-13.

[12] *Reed* v. *Reed,* 93 Idaho 511, 514, 465 P. 2d 635, 638 (1970).

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.[13] Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and

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[13] Indeed, the position of women in this country at its inception is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decisionmaking councils. See M. Gruberg, Women in American Politics 4 (1968). See also 2 A. de Tocqueville, Democracy in America (Reeves trans. 1948).

> independent career from that of her husband. . . .
>
> ". . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell* v. *State,* 16 Wall. 130, 141 (1873) (Bradley, J., concurring).

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally L. Kanowitz, Women and the Law: The Unfinished Revolution 5–6 (1969); G. Myrdal, An American Dilemma 1073 (20th anniversary ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights" [14]—until adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades.[15]

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[14] *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964); see *Dunn* v. *Blumstein,* 405 U. S. 330, 336 (1972); *Kramer* v. *Union Free School District,* 395 U. S. 621, 626 (1969); *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886).

[15] See generally The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969); A. Montagu, Man's Most Dangerous Myth (4th ed. 1964); The President's Commission on the Status of Women, American Women (1963).

Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic,[16] women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.[17] See generally K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970).

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.[18] As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

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[16] See, *e. g.*, Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1507 (1971).

[17] It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government. See Joint Reply Brief of Appellants and American Civil Liberties Union (*Amicus Curiae*) 9.

[18] See, *e. g.*, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1173–1174 (1969).

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, *sex*, or national origin."[19] Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of *sex*."[20] And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[21] Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration. Cf. *Oregon* v. *Mitchell,* 400 U. S. 112, 240, 248–249 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *Katzenbach* v. *Morgan,* 384 U. S. 641, 648–649 (1966).

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[19] 42 U. S. C. §§ 2000e-2 (a), (b), (c) (emphasis added). See generally, Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971).

[20] 29 U. S. C. § 206 (d) (emphasis added). See generally Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963–1970, 39 U. Cin. L. Rev. 615 (1970).

[21] H. R. J. Res. No. 208, 92d Cong., 2d Sess. (1972). In conformity with these principles, Congress in recent years has amended various statutory schemes similar to those presently under consideration so as to eliminate the differential treatment of men and women. See 5 U. S. C. § 2108, as amended, 85 Stat. 644; 5 U. S. C. § 7152, as amended, 85 Stat. 644; 5 U. S. C. § 8341, as amended, 84 Stat. 1961; 38 U. S. C. § 102 (b), as amended, 86 Stat. 1092.

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

III

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated." *Reed* v. *Reed,* 404 U. S., at 77.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.[22]

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits.[23] And in light of the fact that the dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits, rather than through the more costly hearing process,[24] the Government's explanation of the statutory scheme is, to say the least, questionable.

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[22] It should be noted that these statutes are not in any sense designed to rectify the effects of past discrimination against women. See *Gruenwald* v. *Gardner,* 390 F. 2d 591 (CA2), cert. denied, 393 U. S. 982 (1968); cf. *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968); *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages. Cf. *Gaston County* v. *United States,* 395 U. S. 285, 296–297 (1969).

[23] In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full time 12 months per year. See U. S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W. B. Pub. No. 72–191, Mar. 1972). Moreover, 41.5% of all married women are employed. See U. S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971, p. 4 (Summary Special Labor Force Report, Aug. 1972). It is also noteworthy that, while the median income of a

In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois,* 405 U. S. 645, 656 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Carrington* v. *Rash,* 380 U. S. 89 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." *Reed* v. *Reed,* 404 U. S., at 77, 76. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative

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male member of the armed forces is approximately $3,686, see The Report of the President's Commission on an All-Volunteer Armed Force 51, 181 (1970), the median income for all women over the age of 14, including those who are not employed, is approximately $2,237. See Statistical Abstract of the United States Table No. 535 (1972), Source: U. S. Bureau of the Census, Current Population Reports, Series P-60, No. 80. Applying the statutory definition of "dependency" to these statistics, it appears that, in the "median" family, the wife of a male member must have personal expenses of approximately $4,474, or about 75% of the total family income, in order to qualify as a "dependent."

[24] Tr. of Oral Arg. 27-28.

convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.[25]

Reversed.

MR. JUSTICE STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed,* 404 U. S. 71.

MR. JUSTICE REHNQUIST dissents for the reasons stated by Judge Rives in his opinion for the District Court, *Frontiero* v. *Laird,* 341 F. Supp. 201 (1972).

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of MR. JUSTICE BRENNAN, which would hold that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." *Ante,* at 682. It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. *Reed* v. *Reed,* 404 U. S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

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[25] As noted earlier, the basic purpose of these statutes was to provide fringe benefits to members of the uniformed services in order to establish a compensation pattern which would attract career personnel through re-enlistment. See n. 3, *supra,* and accompanying text. Our conclusion in no wise invalidates the statutory schemes except insofar as they require a female member to prove the dependency of her spouse. See *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972); *Levy* v. *Louisiana,* 391 U. S. 68 (1968); *Moritz* v. *Commissioner of Internal Revenue,* 469 F. 2d 466 (CA10 1972). See also 1 U. S. C. § 1.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

MOOR ET AL. *v.* COUNTY OF ALAMEDA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-10. Argued February 27, 1973—Decided May 14, 1973

Petitioners Moor and Rundle brought damages actions in the District Court against respondents, several law enforcement officers and Alameda County. Against the County they alleged federal causes of action under the Civil Rights Act of 1871, 42 U. S. C. §§ 1983 and 1988, and pendent state claims under the state tort claims statute, the federal, as well as the state, causes of action being grounded on the theory that the County was vicariously liable under state law for the officers' acts. Both petitioners alleged federal jurisdiction under 28 U. S. C. § 1343 and Moor, additionally, on diversity grounds. The County moved to dismiss in each case, contending that, as to the Civil Rights Act claims, it was not a suable "person" under *Monroe* v. *Pape,* 365 U. S. 167; that, absent a claim against it as to which there exists an independent basis of federal jurisdiction, application of the pendent jurisdiction doctrine with respect to the state law claims would be inappropriate; and that in Moor's suit it was not a "citizen" for federal diversity purposes. The District Court granted the motions to dismiss, and the Court of Appeals affirmed. *Held:*

1. Section 1988, as is clear from its legislative history, does not independently create a federal cause of action for the violation of federal civil rights, and to apply that provision here by imposing vicarious liability upon the County would contravene the holding in *Monroe* v. *Pape, supra,* and Congress' intent to exclude a State's political subdivision from civil liability under § 1983. Pp. 698-710.

2. Even assuming, *arguendo,* that the District Court had judicial power to exercise pendent jurisdiction over petitioners' state law claims which would require that the County be brought in as a new party defendant, against which petitioners could not state a federally cognizable claim, in addition to the individual defendants against whom they could assert such a claim, the court did not abuse its discretion in not exercising that power in view of unsettled questions of state law that it would have been called upon to resolve and the likelihood of jury confusion resulting from

the special defenses to a county available under the state tort claims law. Pp. 710–717.

3. The District Court erred in rejecting petitioner Moor's state law claim against the County, which under California law has an independent status, on the basis of diversity of citizenship, since diversity jurisdiction extends to a State's political subdivision that is not simply the arm or *alter ego* of the State, *Cowles* v. *Mercer County,* 7 Wall. 118. Pp. 717–722.

458 F. 2d 1217, affirmed in part, reversed in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 722.

Ronald M. Greenberg argued the cause and filed briefs for petitioners.

Peter W. Davis argued the cause for respondents. With him on the brief was *Raoul D. Kennedy.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises three distinct questions concerning the scope of federal jurisdiction. We are called upon to decide whether a federal cause of action lies against a municipality under 42 U. S. C. §§ 1983 and 1988 for the actions of its officers which violate an individual's federal civil rights where the municipality is subject to such liability under state law. In addition, we must decide whether, in a federal civil rights suit brought against a municipality's police officers, a federal court may refuse to exercise pendent jurisdiction over a state law claim against the municipality based on a theory of vicarious liability, and whether a county of the State of California is a citizen of the State for purposes of federal diversity jurisdiction.

In February 1970, petitioners Moor and Rundle[1] filed separate actions in the District Court for the Northern District of California seeking to recover actual and punitive damages for injuries allegedly suffered by them as a result of the wrongful discharge of a shotgun by an Alameda County, California, deputy sheriff engaged in quelling a civil disturbance.[2] In their complaints, petitioners named the deputy sheriff, plus three other deputies, the sheriff, and the County of Alameda as defendants. The complaints alleged both federal and state causes of action.

The federal causes of action against the individual defendants were based on allegations of conspiracy and intent to deprive petitioners of their constitutional rights of free speech and assembly, and to be secure from the deprivation of life and liberty without due process of law. These federal causes of action against the individual defendants were alleged to arise under, *inter alia,* 42 U. S. C. §§ 1983 and 1985, and jurisdiction was asserted to exist under 28 U. S. C. § 1343.

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[1] Named as plaintiffs in the *Rundle* case in addition to petitioner William D. Rundle, Jr., were his guardian *ad litem,* William D. Rundle, and Sarah Rundle. William D. Rundle and Sarah Rundle are also petitioners here, but for ease of discussion we will refer simply to petitioner Rundle.

[2] Neither complaint specifically states any claim for equitable relief. Furthermore, the complaints contain no allegations of an ongoing course of conduct, irreparable injury, inadequacy of legal remedy, or other similar allegations generally found in complaints seeking equitable relief. Throughout the course of this litigation the petitioners have given no indication that they seek equitable, as well as legal, relief. Before this Court the petitioners state nothing more than that "[p]laintiffs in both cases seek damages from the defendants . . . ." Brief for Petitioners 4. Therefore, the question on which our Brother DOUGLAS hinges his dissent—namely, whether a municipality may be sued for equitable relief under § 1983—simply is not presented here.

As to the County, both the federal and state law claims were predicated on the contention that under the California Tort Claims Act of 1963, Cal. Govt. Code § 815.2 (a), the County was vicariously liable for the acts of its deputies and sheriff committed in violation of the Federal Civil Rights Act.[3] The federal causes of action against the County were based on 42 U. S. C. §§ 1983 and 1988,[4] and thus jurisdiction was also alleged to exist with respect to these claims under 28 U. S. C. § 1343. Both petitioners argued before the District Court that it had authority to hear their state law claims against the County under the doctrine of pendent jurisdiction. In addition, petitioner Moor who alleged that he was a citizen of Illinois asserted in his complaint that the District Court also had jurisdiction over his state law claim against the County on the basis of diversity of citizenship.[5]

Initially, the defendants answered both complaints denying liability, although the County admitted that it had consented to be sued.[6] Thereafter, the County, arguing lack of jurisdiction, moved to dismiss all of the claims against it in the *Rundle* suit and to dismiss the federal civil rights claims in the *Moor* suit. The County relied upon this Court's decision in *Monroe* v. *Pape,* 365

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[3] Although the County vigorously disputes the petitioners' construction of § 815.2 (a) of the California Tort Claims Act, we do not pass upon the parties' conflicting constructions since the question was not decided by either of the courts below.

[4] In their complaints, petitioners also asserted causes of action under 42 U. S. C. §§ 1981 and 1986. But before this Court petitioners have restricted their arguments to §§ 1983 and 1988. Hence, only those sections are now before us.

[5] Petitioner Rundle alleged in his complaint that he was a citizen of California, and therefore he was unable to assert jurisdiction over his state law claims on the basis of diversity of citizenship.

[6] See Answer to Complaint, *Moor* v. *Madigan,* App. 12; Answer to Complaint, *Rundle* v. *Madigan,* App. 29.

U. S. 167, 187–191 (1961), as having resolved that a municipality is not a "person" within the meaning of 42 U. S. C. § 1983, and on this basis alone it considered the civil rights claims against it to be barred. Moreover, in *Rundle,* the County argued that since there was before the District Court no claim against the County as to which there existed an independent basis of federal jurisdiction, it would be inappropriate to exercise pendent jurisdiction over the state law claim against it.

The District Court agreed with the County's arguments and granted the motion to dismiss the *Rundle* suit. It, however, postponed ruling in the *Moor* case pending consideration of possible diversity jurisdiction over the state law claim against the County in that case. Subsequently, the County sought to have the state law claim in *Moor* dismissed on the basis that it was not a citizen of California for purposes of diversity jurisdiction. While this motion was pending, a motion for reconsideration of the order dismissing the County was filed in the *Rundle* case. Following argument with respect to the jurisdictional issues, the District Court entered an order in *Moor* holding that there was no diversity jurisdiction and incorporating by reference an order filed in the *Rundle* case which again rejected petitioners' civil rights and pendent jurisdiction arguments. Upon the request of the petitioners, the District Court, finding "no just reason for delay," entered a final judgment in both suits with respect to the County under Fed. Rule Civ. Proc. 54 (b), thereby allowing immediate appeal of its jurisdictional decisions.[7]

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[7] Subsequent to this decision with respect to the County, the District Court denied the individual defendants' motion to dismiss or, in the alternative, for summary judgment. The District Court also denied petitioners' motion for summary judgment. See Ex. A to Reply Brief for Petitioners.

The two cases were then consolidated for purposes of appeal, and the Court of Appeals for the Ninth Circuit affirmed the District Court with respect to all three issues raised by the two cases, 458 F. 2d 1217 (1972). In addition to rejecting petitioners' arguments concerning the existence of pendent jurisdiction and diversity jurisdiction over the state law claims, the Court of Appeals disagreed in particular with petitioners' contention that § 1988 alone established a federal cause of action against the County for their injuries on the basis of California law which created vicarious liability against the County for the actions of its officers that violated petitioners' federal civil rights. Because of the importance of the questions decided by the Court of Appeals, we granted certiorari. 409 U. S. 841 (1972). For reasons stated below, we now affirm that portion of the Court of Appeals' decision which held that petitioners had failed to establish a cause of action against the County under 42 U. S. C. §§ 1983 and 1988, and that the trial court properly refused to exercise pendent jurisdiction over the state law claims. We reverse, however, its holding that the County is not a citizen of California for purposes of federal diversity jurisdiction.

I

We consider first petitioners' argument concerning the existence of a federal cause of action against the County under 42 U. S. C. § 1988. Petitioners' thesis is, in essence, that under California law the County has been made vicariously liable for the conduct of its sheriff and deputy sheriffs which violates the Federal Civil Rights Acts[8] and that, in the context of this case, § 1988 authorizes the adoption of such state law into federal law in order to render the Civil Rights Acts fully effective, thereby creating a federal cause of action against the County.

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[8] See 42 U. S. C. § 1981 *et seq.*

Section 1988 reads, in relevant part, as follows:

> "The jurisdiction in civil . . . matters conferred on the district courts by [the Civil Rights Acts] . . . , for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . , the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

The starting point for petitioners' argument is this Court's decision in *Monroe* v. *Pape,* 365 U. S. 167 (1961). There the Court held that 42 U. S. C. § 1983, which was derived from § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, was intended to provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges, and immunities.[9] At the same time, however, the

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[9] Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Court held that a municipality is not a "person" within the meaning of § 1983. *Id.*, at 187–191. Petitioners do not squarely take issue with the holding in *Monroe* concerning the status under § 1983 of public entities such as the County. Instead, petitioners argue that since the construction placed upon § 1983 in *Monroe* with respect to municipalities effectively restricts the injured party in a case such as this to recovery from the individual defendants, the section cannot be considered to be fully "adapted" to the protection of federal civil rights or is "deficient in the provisions necessary to furnish suitable remedies" within the meaning of § 1988. In petitioners' view, the personal liability of the individual defendants under § 1983 is, as a practical matter, inadequate because public officers are frequently judgment-proof.[10] Thus, petitioners contend it is appropriate under § 1988 for this Court to adopt into federal law the California law of vicarious liability for municipalities—that is, the "common law, as modified . . . by . . . statutes of the State wherein the court having jurisdiction of such civil . . . cause is held." Having thus introduced the State's law of vicarious liability into federal law through § 1988, they then assert that there is federal jurisdiction to hear their federal claims against the County under 28 U. S. C. § 1343 (4). Section 1343 (4) grants jurisdiction to the federal district courts to hear any civil action "commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ," and § 1988 is, petitioners say, such an "Act of Congress."

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[10] See, *e. g.*, Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act, 45 S. Cal. L. Rev. 131, 136–137, 157 (1972); Note, Philadelphia Police Practice and the Law of Arrest, 100 U. Pa. L. Rev. 1182, 1208–1209 (1952); cf. *Lankford* v. *Gelston*, 364 F. 2d 197, 202 (CA4 1966).

Before this Court the parties have disagreed as to the extent of the individual defendants' personal assets and insurance that might be available to satisfy any favorable final judgment which petitioners might ultimately obtain. See Brief for Respondents 15; Tr. of Oral Arg. 25; *id.*, at 50–51. In light of our conclusion as to the limited function of § 1988 in the scheme of federal civil rights legislation we have no occasion here to pass upon the adequacy of the relief available against the individual defendants.

Petitioners in this case are not asking us to create a substantive federal liability without legislative direction. See *United States* v. *Standard Oil Co.,* 332 U. S. 301 (1947); cf. *United States* v. *Gilman,* 347 U. S. 507 (1954). It is their view, rather, that in § 1988 Congress has effectively mandated the adoption of California's law of vicarious liability into federal law. It is, of course, not uncommon for Congress to direct that state law be used to fill the interstices of federal law.[11] But in such circumstances our function is necessarily limited. For although Congress may have assigned to the process of judicial implication the task of selecting in any particular case appropriate rules from state law to supplement established federal law, the application of that process is restricted to those contexts in which Congress has in fact authorized resort to state and common law.[12] Cf. *Richards* v. *United States,* 369 U. S. 1, 7–8 (1962). Considering § 1988 from this perspective, we are unable to conclude that Congress intended that section, standing alone, to authorize the federal courts to borrow entire causes of action from state law.

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[11] A ready example of such federal adoption of state law is to be found in the Federal Tort Claims Act under which the United States is made liable for certain torts of its employees in accordance with relevant state law. See 28 U. S. C. §§ 1346 (b); 2671–2680. See also *Richards* v. *United States,* 369 U. S. 1, 6–10 (1962). Still other examples are the Outer Continental Shelf Lands Act, 43 U. S. C. §§ 1331–1343, and the provisions of the Assimilative Crimes Act which provides for punishment as federal crimes of acts, committed within the maritime or territorial jurisdiction of the United States, that would have been punishable as a crime under the laws of the State, territory, or district where committed, 18 U. S. C. §§ 7, 11.

[12] Hence, this is a wholly different case from those in which,

First, petitioners' argument completely overlooks the full language of the statute. Section 1988 does not enjoy the independent stature of an "Act of Congress providing for the protection of civil rights," 28 U. S. C. § 1343 (4). Rather, as is plain on the face of the statute, the section is intended to complement the various acts which do create federal causes of action for the violation of federal civil rights.[13] Thus, § 1988 specifies that "[t]he jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter [Civil Rights] and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States." But inevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action.[14] Thus, § 1988 proceeds to au-

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lacking any clear expression of congressional will, we have been called upon to decide whether it is appropriate to look to state law or to fashion a single federal rule in order to fill the interstices of federal law. See, *e. g., United States* v. *Yazell*, 382 U. S. 341 (1966); *Bank of America National Trust & Savings Assn.* v. *Parnell*, 352 U. S. 29 (1956); *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943); *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447 (1942).

[13] See, *e. g.*, 42 U. S. C. §§ 1981, 1982, 1983, 1985. See also 18 U. S. C. §§ 241-245.

[14] One such problem has been the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant. Although an injured party's personal claim was extinguished at common law upon the death of either the injured party himself or the alleged wrongdoer, see W. Prosser, Torts 888-891 (4th ed. 1971), it has been held that pursuant to § 1988 state survivorship statutes which reverse the common-law rule may be used in the context of actions brought under § 1983. See, *e. g., Brazier* v. *Cherry*, 293

thorize federal courts, where federal law is unsuited or insufficient "to furnish suitable remedies," to look to principles of the common law, as altered by state law, so long as such principles are not inconsistent with the Constitution and laws of the United States.

The role of § 1988 in the scheme of federal civil rights legislation is amply illustrated by our decision in *Sullivan* v. *Little Hunting Park,* 396 U. S. 229 (1969). In *Sullivan,* the Court was confronted with a question as to the availability of damages in a suit concerning discrimination in the disposition of property brought pursuant to § 1982 which makes no express provision for a damages remedy.[15] The Court concluded that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies," *id.,* at 239, and proceeded to construe § 1988, which provides the governing standard in such a case, to mean "that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." *Id.,* at 240.[16] Properly viewed, then, § 1988 instructs federal courts as to what law to apply in causes of actions arising under federal civil rights acts. But we do not believe that the section, without more, was meant to authorize the wholesale importation into federal law of state causes

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F. 2d 401 (CA5 1961); *Pritchard* v. *Smith,* 289 F. 2d 153 (CA8 1961).

[15] Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[16] See also *McDaniel* v. *Carroll,* 457 F. 2d 968 (CA6 1972), and cases cited n. 14, *supra.*

of action[17]—not even one purportedly designed for the protection of federal civil rights.

This view is fully confirmed by the legislative history of the statute: Section 1988 was first enacted as a portion of § 3 of the Civil Rights Act of April 9, 1866, c. 31, 14 Stat. 27. Section 1 of that Act is the source of 42 U. S. C. § 1982, the provision under which suit was brought in *Sullivan*. The initial portion of § 3 of the

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[17] We know of no lower court decision that has held otherwise. To the contrary, the lower federal courts have repeatedly rejected the argument § 1988 independently creates a federal cause of action for the violation of federal civil rights. See *Pierre* v. *Jordan*, 333 F. 2d 951, 958 (CA9 1964); *Otto* v. *Somers*, 332 F. 2d 697, 699 (CA6 1964); *Post* v. *Payton*, 323 F. Supp. 799, 802–803 (EDNY 1971); *Johnson* v. *New York State Education Dept.*, 319 F. Supp. 271, 276 (EDNY 1970), aff'd, 449 F. 2d 871 (CA2 1971), vacated and remanded on other grounds, 409 U. S. 75 (1972); *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220, 228–229 (Haw. 1956), rev'd on other grounds, 256 F. 2d 728 (CA9 1958); *Schatte* v. *International Alliance of Theatrical Stage Employees and Moving Picture Operators of United States and Canada*, 70 F. Supp. 1008 (SD Cal. 1947), aff'd, *per curiam*, 165 F. 2d 216 (CA9 1948); cf. *In re Stupp*, 23 F. Cas. 296, 299 (No. 13,563) (CCSDNY 1875).

Petitioners' reliance in this case upon *Hesselgesser* v. *Reilly*, 440 F. 2d 901, 903 (CA9 1971), and *Lewis* v. *Brautigam*, 227 F. 2d 124, 128 (CA5 1955), is misplaced. In *Hesselgesser*, the Court of Appeals ruled that a sheriff could be held vicariously liable in damages for the wrongful act of his deputy which deprived a prisoner of his civil rights where state law provided for such vicarious liability. The court, to be sure, found authority for the incorporation of state law into federal law in § 1988, but it was acting in the context of a suit brought against the sheriff on the basis of § 1983. Likewise in *Lewis*, where a sheriff was held to be liable for the civil rights violations of his deputies in light of state law which imposed such liability—a decision which also rested apparently upon § 1988, although that section was not specifically cited—the cause of action was properly based on § 1983. These decisions simply do not support the suggestion that § 1988 alone authorizes the creation of a federal cause of action against the County. And here, as discussed below, § 1983 is unavailable as a basis for suit against the County.

Act established federal jurisdiction to hear, among other things, civil actions brought to enforce § 1. Section 3 then went on to provide that the jurisdiction thereby established should be exercised in conformity with federal law where suitable and with reference to the common law, as modified by state law, where federal law is deficient.[18] Considered in context, this latter portion of § 3, which has become § 1988 and has been made applicable to the Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act, including § 1.[19] To hold otherwise would tear § 1988 loose from its roots in § 3 of the 1866 Civil Rights Act. This we will not do.

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[18] As enacted, § 3 read, in part, as follows:

"That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act . . . . The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty."

[19] Following the ratification of the Fourteenth Amendment in 1868, the Act of April 9, 1866, was re-enacted without change in the Act of May 31, 1870, c. 114, § 18, 16 Stat. 144. At the same time, Congress enacted what is now 42 U. S. C. § 1981. See Act of

There is yet another reason why petitioners' reliance upon § 1988 must fail. The statute expressly limits the authority granted federal courts to look to the common law, as modified by state law, to instances in which that law "is not inconsistent with the Constitution and laws of the United States." Yet if we were to look to California law imposing vicarious liability upon municipalities, as petitioners would have us do, the result would effectively be to subject the County to federal court suit on a federal civil rights claim. Such a result would seem to be less than consistent with this Court's prior holding in *Monroe* v. *Pape,* 365 U. S., at 187–191, that Congress did not intend to render municipal corporations liable to federal civil rights claims under § 1983. See, *e. g., Brown* v. *Town of Caliente,* 392 F. 2d 546 (CA9 1968); *Ries* v. *Lynskey,* 452 F. 2d 172, 174–175 (CA7 1971); *Brown* v. *Ames,* 346 F. Supp. 1173, 1176 (Minn. 1972); *Wilcher* v. *Gain,* 311 F. Supp. 754, 755 (ND Cal. 1970).

Petitioners argue, however, that there is in fact no inconsistency between the interpretation placed upon

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May 31, 1870, c. 114, § 16, 16 Stat. 144. Section 18 of the Act also provided that the provision now contained in § 1981 was to be enforced in accordance with the provisions of the Act of April 9, 1866. Thus, Congress again directed merely that § 1988 would guide courts in the enforcement of a particular cause of action, namely, that created in § 1981. Similarly, when 42 U. S. C. § 1983 was first enacted, it was made "subject to the same rights of appeal, review upon error, and other remedies provided in like cases . . . under the provisions of the act of the ninth of April, eighteen hundred and sixty-six . . . ." Act of Apr. 20, 1871, c. 22, § 1, 17 Stat. 13. Codification saw § 1988 made into § 722 of the Revised Statutes, with the statute being made generally applicable to, *inter alia,* the Civil Rights portion of the Revised Statutes, see §§ 1977–1991.

§ 1983 in *Monroe* and the interpretation of § 1988 for which they now argue here. They suggest that *Monroe* involved no question of the susceptibility to suit of a municipality which has surrendered its common-law immunity under state law; the interpretation of § 1983 in *Monroe* was, in their view, premised upon an assumption that the municipality had not been deprived of its immunity. And Congress, petitioners argue, did not intend to exclude from the reach of § 1983 municipalities that have surrendered their immunity from suit under state law. Thus, they conclude that in a case such as this, where the municipality has lost its immunity, there is no inconsistency between § 1983 and the introduction of the state cause of action against the County into federal law under § 1988.

In effect, petitioners are arguing that their particular actions may be properly brought against this County on the basis of § 1983. But whatever the factual premises of *Monroe,* we find the construction which petitioners seek to impose upon § 1983 concerning the status of municipalities as "persons" to be simply untenable.

In *Monroe,* the Court, in examining the legislative evolution of the Ku Klux Klan Act of April 20, 1871, which is the source of § 1983, pointed out that Senator Sherman introduced an amendment which would have added to the Act a new section providing expressly for municipal liability in civil actions based on the deprivation of civil rights. Although the amendment was passed by the Senate,[20] it was rejected by the House,[21] as was another version included in the first Conference Committee report.[22] The proposal for municipal liability encountered strongly held views in the House on the part of both its supporters and opponents,[23] but the root of the proposal's difficulties stemmed from serious legislative concern as to Congress' constitutional power to impose liability on political subdivisions of the States.[24]

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[20] Cong. Globe, 42d Cong., 1st Sess., 704–705 (1871). The proposed amendment is quoted in *Monroe* v. *Pape,* 365 U. S. 167, 188 n. 38 (1961).

[21] Cong. Globe, 42d Cong., 1st Sess., 725 (1871).

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[22] *Id.*, at 800–801. The version proposed by the Conference Committee report is quoted in *Monroe* v. *Pape*, 365 U. S., at 188–189, n. 41.

[23] The essence of the position taken by the supporters of the provision imposing vicarious liability on local municipalities for injuries suffered due to the violation of civil rights was "that by making the whole body of citizens insurers for the victims you will have a safeguard which no police arrangement can make, one more effective than any other . . . ." Cong. Globe, 42d Cong., 1st Sess., 794 (1871) (remarks of Rep. Kelley). See also *id.*, at 792 (remarks of Rep. Butler). As to general view in opposition, see *id.*, at 788–789 (remarks of Rep. Kerr); *id.*, at 791 (remarks of Rep. Willard).

[24] For instance, Representative Kerr argued:

"I now come to inquire is it competent for the Congress of the United States to punish municipal organizations of this kind in this way at all, with or without notice? My judgment is that such power nowhere exists; that it cannot be found within the limits of the Constitution; that its exercise cannot be justified by any rational construction of that instrument. I hold that the constitutional power of the Federal Government to punish the citizens of the United States for any offenses punishable by it at all may be exercised and exhausted against the individual offender and his property; but when you go one inch beyond that you are compelled, by the very necessities which surround you, to invade powers which are secured to the States, which are a necessary and most essential part of the autonomy of State governments, without which there can logically be no State government." *Id.*, at 788.

Similarly, Representative Willard explained his opposition to the amendment as follows:

"Now, sir, the Constitution has not imposed, we have not by the Constitution imposed, any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges, and immunities. The Constitution has declared that to be the duty

As in *Monroe,* we have no occasion here to "reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals." 365 U. S., at 191. For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did in fact act, see *Ries* v. *Lynskey,* 452 F. 2d, at 175. In this respect, it cannot be doubted that the House arrived at the firm conclusion that Congress lacked the constitutional power to impose liability upon municipalities, and thus, according to Representative Poland, the Senate Conferees were informed by the House Conferees that the "section imposing liability upon towns and counties must go out or we should fail to agree." [25] To save the Act, the proposal for municipal liability was

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of the State. The Constitution, in effect, says that no State shall deny to its citizens the equal protection of the laws, and I understand that that declaration, that prohibition, applies only to the States, so far as political or municipal action is concerned. But the State, within its boundaries, has the creation and the control of the laws for the protection of the people." *Id.,* at 791.

And Representative Poland contended:

"As I understand the theory of our Constitution, the national Government deals either with States or with individual persons. So far as we are a national Government in the strict sense we deal with persons, with every man who is an inhabitant of the United States, as if there were no States, towns, or counties; as if the whole country were in one general mass, without any subdivisions of States, counties, or towns. We deal with them as citizens or inhabitants of this great Republic. With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever." *Id.,* at 793.

See also *id.,* at 795 (remarks of Rep. Blair); *id.,* at 798 (remarks of Rep. Bingham).

[25] *Id.,* at 804.

given up.[26] It may be that even in 1871 municipalities which were subject to suit under state law did not pose in the minds of the legislators the constitutional problems that caused the defeat of the proposal. Yet nevertheless the proposal was rejected *in toto,* and from this action we cannot infer any congressional intent other than to exclude all municipalities—regardless of whether or not their immunity has been lifted by state law—from the civil liability created in the Act of April 20, 1871, and § 1983.[27] Thus, § 1983 is unavailable to these petitioners insofar as they seek to sue the County. And § 1988, in light of the express limitation contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983.

Accordingly, we conclude that the District Court properly granted the motion to dismiss the causes of action brought against the County by petitioners under § 1983 and § 1988.

II

Although unable to establish a federal cause of action against the County on the basis of the California law imposing vicarious liability on a municipality for the actions of its officers that violate federal civil rights, petitioners contend that the District Court nevertheless had jurisdiction to hear their state law claims of vicarious liability against the County under the doctrine of pendent jurisdiction.

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[26] All reference to municipal liability was deleted from the provision submitted by the Conference Committee, and it was enacted as 42 U. S. C. § 1986, which imposes liability upon any person who has "knowledge [of] any of the wrongs conspired to be done, and mentioned in" 42 U. S. C. § 1985.

[27] Petitioners argue that merely because "Congress [did] not intend, as a matter of federal law, to impose vicarious liability upon a public entity for violations of the Civil Rights Acts committed by the entity's employees," it does not follow "that Congress also intended to preclude a state from imposing such vicarious liability as a matter of state law." Reply Brief for Petitioners 4–5. Certainly this is true. But this fact does not assist petitioners, for the very issue here is ultimately what Congress intended federal law to be, and, as petitioners themselves recognize, Congress did not intend, *as a matter of federal law,* to impose vicarious liability on municipalities for violations of federal civil rights by their employees.

Petitioners rely principally upon the decision in *Mine Workers* v. *Gibbs,* 383 U. S. 715, 725 (1966), where the Court eschewed the "unnecessarily grudging" approach of *Hurn* v. *Oursler,* 289 U. S. 238 (1933), to the doctrine of pendent jurisdiction. *Gibbs* involved a suit brought under both federal and state law by a contractor to recover damages allegedly suffered as a result of a secondary boycott imposed upon it by a union. There existed independent federal jurisdiction as to the federal claim, but there was no independent basis of jurisdiction to support the state law claim. Nevertheless, the Court concluded that federal courts could exercise pendent jurisdiction over the state law claim.

In deciding the question of pendent jurisdiction, the *Gibbs* Court indicated that there were two distinct issues to be considered. First, there is the issue of judicial power to hear the pendent claim. In this respect the Court indicated that the requisite "power" exists

> "whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' U. S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But

> if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.,* at 725 (footnotes omitted).

Yet even if there exists power to hear the pendent claim, "[i]t has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them . . . ." *Id.,* at 726. By way of explanation of the considerations which should inform a district court's discretion, the Court in *Gibbs* suggested, *inter alia,* that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law," *ibid.,* and that "reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, [may] justify separating state and federal claims for trial," *id.,* at 727. In *Gibbs,* the Court found that the exercise of pendent jurisdiction over the state law claims was proper both as a matter of power and discretion.

In these cases, there is no question that petitioners' complaints stated substantial federal causes of action against the individual defendants under 42 U. S. C. § 1983. See *Monroe* v. *Pape,* 365 U. S. 167 (1961). Nor is there any dispute that the federal claims against the individual defendants and the state claims against the individual defendants may be said to involve "a common nucleus of operative fact." But, beyond this, there is a significant difference between *Gibbs* and these cases. For the exercise of pendent jurisdiction over the claims against the County would require us to bring an entirely new party—a new defendant—into each litigation. *Gibbs,* of course, involved no such problem of a "pendent party," [28] that is, of the addition of a party which is implicated in the litigation only with respect to the pendent state law claim and not also with respect to any claim as to which there is an independent basis of federal jurisdiction. Faced with this distinction, the courts below concluded that the exercise of pendent jurisdiction in the context of these cases was inappropriate as a matter of both judicial power and discretion.

As to the question of judicial power, the District Court and Court of Appeals considered themselves bound by the Ninth Circuit's previous decision in *Hymer* v. *Chai,* 407 F. 2d 136 (1969), wherein the court refused to permit the joinder of a pendent plaintiff. Petitioners vigorously attack the decision in *Hymer* as at odds with the clear trend of lower federal court authority since this Court's decision in *Gibbs.* It is true that numerous decisions throughout the courts of appeals since *Gibbs* have recognized the existence of judicial power to hear pendent claims involving pendent parties where "the entire action before the court comprises but one constitutional 'case' " as defined in *Gibbs.*[29] *Hymer* stands virtually alone against this post-*Gibbs* trend in the courts of appeals,[30] and significantly *Hymer* was largely based on the Court of Appeals' earlier decision in *Kataoka* v. *May Department Stores Co.,* 115 F. 2d 521 (CA9 1940), a decision which predated *Gibbs* and the expansion of the concept of pendent jurisdiction beyond the narrow limits set by *Hurn* v. *Oursler, supra.* Moreover, the exercise of federal jurisdiction over claims against parties as to whom there exists no independent basis for federal jurisdiction finds substantial analogues in the joinder of new parties under the well-established doctrine of ancillary jurisdiction in the context of compulsory counter-

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[28] See generally Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 662–664 (1968).

[29] See *Almenares* v. *Wyman,* 453 F. 2d 1075, 1083–1085 (CA2 1971); *Leather's Best, Inc.* v. *S. S. Mormaclynx,* 451 F. 2d 800, 809–810 (CA2 1971); *Nelson* v. *Keefer,* 451 F. 2d 289, 291 (CA3 1971); *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.,* 441 F. 2d 627 (CA2 1971); *F. C. Stiles Contracting Co.* v. *Home Insurance Co.,* 431 F. 2d 917, 919–920 (CA6 1970); *Beautytuft, Inc.* v. *Factory Ins. Assn.,* 431 F. 2d 1122, 1128 (CA6 1970); *Hatridge* v. *Aetna*

Casualty & Surety Co., 415 F. 2d 809, 816–817 (CA8 1969); *Stone* v. *Stone,* 405 F. 2d 94 (CA4 1968); *Connecticut General Life Ins. Co.* v. *Craton* 405 F. 2d 41, 48 (CA5 1968); *Jacobson* v. *Atlantic City Hospital,* 392 F. 2d 149, 153–154 (CA3 1968); *Wilson* v. *American Chain & Cable Co.,* 364 F. 2d 558, 564 (CA3 1966). See also, *e. g., Eidschun* v. *Pierce,* 335 F. Supp. 603, 609–610 (SD Iowa 1971); *Thomas* v. *Old Forge Coal Co.,* 329 F. Supp. 1000 (MD Pa. 1971); *Newman* v. *Freeman,* 262 F. Supp. 106, 107–109 (ED Pa. 1966); *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.,* 261 F. Supp. 905, 907–908 (ND Ill. 1966); *Morris* v. *Gimbel Brothers, Inc.,* 246 F. Supp. 984 (ED Pa. 1965). On occasion, decisions of district courts refusing to exercise jurisdiction over claims against pendent parties have been sustained on appeal simply on the ground that the decisions were not an abuse of discretion. See *Patrum* v. *City of Greensburg,* 419 F. 2d 1300, 1302 (CA6 1969); *Williams* v. *United States,* 405 F. 2d 951, 955 (CA9 1969).

[30] The only court of appeals decision outside of the Ninth Circuit cited to us by the County in support of its position is *Wojtas* v. *Village of Niles,* 334 F. 2d 797 (CA7 1964), a decision which preceded the expansion of pendent jurisdiction in *Mine Workers* v. *Gibbs.* A number of district courts, however, have refused to exercise jurisdiction over claims against pendent parties, generally relying on *Wojtas* and/or *Hymer* v. *Chai.* See, *e. g., Redden* v. *Cincinnati, Inc.,* 347 F. Supp. 1229, 1231 (ND Ga. 1972); *Payne* v. *Mertens,* 343 F. Supp. 1355, 1358 (ND Cal. 1972); *Barrows* v. *Faulkner,* 327 F. Supp. 1190 (ND Okla. 1971); *Letmate* v. *Baltimore & O. R. Co.,* 311 F. Supp. 1059, 1060–1062 (Md. 1970); *Tucker* v. *Shaw,* 308 F. Supp. 1, 9–10 (EDNY 1970); *Hall* v. *Pacific Maritime Assn.,* 281 F. Supp. 54, 61 (ND Cal. 1968);

claims under Fed. Rules Civ. Proc. 13 (a) and 13 (h),[31] and in the context of third-party claims under Fed. Rule Civ. Proc. 14 (a).[32] At the same time, the County counsels that the Court should not be quick to sweep state law claims against an entirely new party within the jurisdiction of the lower federal courts which are courts of limited jurisdiction—a jurisdiction subject, within the limits of the Constitution, to the will of Congress, not the courts.[33] Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far-reaching implications. But we do not consider it appropriate to resolve this difficult issue in the present case, for we have concluded that even assuming, *arguendo,* the existence of power to hear the claim, the District Court, in exercise of its legitimate discretion, properly declined to join the claims against the County in these suits.

The District Court indicated, and the Court of Appeals agreed, that exercise of jurisdiction over the state law claims was inappropriate for at least two reasons. First, the District Court pointed out that it "would be

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Rosenthal & Rosenthal, Inc. v. *Aetna Casualty & Surety Co.*, 259 F. Supp. 624, 630–631 (SDNY 1966).

[31] See, *e. g., H. L. Peterson Co.* v. *Applewhite,* 383 F. 2d 430, 433–434 (CA5 1967); *Albright* v. *Gates,* 362 F. 2d 928 (CA9 1966); *Union Paving Co.* v. *Downer Corp.*, 276 F. 2d 468, 471 (CA9 1960); *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F. 2d 213, 216–217 (CA2 1955); *Markus* v. *Dillinger,* 191 F. Supp. 732, 735 (ED Pa. 1961): cf. *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329 (1887); *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 608–609 (1926).

[32] See, *e. g., Pennsylvania R. Co.* v. *Erie Ave. Warehouse Co.*, 302 F. 2d 843, 844 (CA3 1962); *Southern Milling Co.* v. *United States,* 270 F. 2d 80, 84 (CA5 1959); *Dery* v. *Wyer,* 265 F. 2d 804, 807–808 (CA2 1959); *Waylander-Peterson Co.* v. *Great Northern R. Co.*, 201 F. 2d 408, 415 (CA8 1953).

[33] Cf. Shakman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan. L. Rev. 262, 265–266, 270–271 (1968).

called upon to resolve difficult questions of California law upon which state court decisions are not legion." [34] In addition, the court felt that "with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case" which will be tried to a jury, "could become unduly complicated." [35] As is evident from this Court's decision in *Gibbs,* 383 U. S., at 726–727, the unsettled nature of state law and the likelihood of jury confusion were entirely appropriate factors for the District Court to consider. And those factors had to be weighed by the District Court against the economy which might be achieved by trying the petitioners' claims against both the police and the County in single proceedings. In light of the broad discretion which district courts must be given in evaluating such matters, we cannot say that the District Judge in these cases struck the balance improperly.[36] We therefore hold that the District Court did not err, as a matter of discretion, in refusing to exercise pendent jurisdiction over petitioners' claims against the County.

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[34] *Rundle* v. *Madigan,* 331 F. Supp. 492, 495 n. 5 (ND Cal. 1971).

[35] *Ibid.*

[36] Since we hold in Part III that the County is a citizen of California for purposes of diversity jurisdiction, the state law claim against the County will in fact be before the District Court on remand in the *Moor* case. But this fact does not in our opinion call for further consideration of the pendent jurisdiction issue by the District Court. Given our decision in Part III, the issue of pendent jurisdiction is without further consequence for petitioner Moor. And it is clear that the mere fact that the County will be before the District Court in petitioner Moor's case does not significantly affect the basis of the District Court's discretionary judgment with respect to petitioner Rundle's suit. For counsel for petitioners specifically indicated at oral argument that the petitioners' suits were consolidated only for purposes of appeal, and that petitioners' "injuries are different and the cases will be tried separately," Tr. of Oral Arg. 47. Thus, even considering our decision in Part III as to petitioner Moor's claim against the County, we see no reason to upset the District Court's determination that it would not hear the complicating state law claim against the County where, as in Rundle's suit, it

III

There remains, however, the question whether the District Court had jurisdiction over petitioner Moor's state law claim against the County on the basis of diversity of citizenship, 28 U. S. C. § 1332 (a). Petitioner Moor, a citizen of Illinois, contends that the County is a citizen of California for the purposes of federal diversity jurisdiction. The District Court concluded otherwise, however. For while acknowledging that there exists a substantial body of contrary authority, it considered itself "bound to recognize and adhere to the Ninth Circuit decisions which hold that California counties and other subdivisions of the State are not 'citizens' for diversity purposes,"[37] see *Miller* v. *County of Los Angeles,* 341 F. 2d 964 (CA9 1965); *Lowe* v. *Manhattan Beach City School Dist.,* 222 F. 2d 258 (CA9 1955). Not surprisingly, the Court of Appeals also adhered to its prior precedents.

There is no question that a State is not a "citizen" for purposes of the diversity jurisdiction. That proposition has been established at least since this Court's decision in *Postal Telegraph Cable Co.* v. *Alabama,* 155 U. S. 482, 487 (1894). See also *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48, 63 (1904). At the same time, however, this Court has recognized that a political subdivision of a State, unless it is simply "the arm or *alter ego* of the State,"[38] is a citizen of the State for diversity purposes.

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has a choice in light of the substantial element of discretion inherent in the doctrine of pendent jurisdiction.

[37] Appendix E to Pet. for Cert. 18–19.

[38] *State Highway Comm'n of Wyoming* v. *Utah Construction Co.,* 278 U. S. 194, 199 (1929).

See, *e. g., Bullard* v. *City of Cisco,* 290 U. S. 179 (1933); *Loeb* v. *Columbia Township Trustees,* 179 U. S. 472, 485–486 (1900); *Chicot County* v. *Sherwood,* 148 U. S. 529, 533–534 (1893); *Lincoln County* v. *Luning,* 133 U. S. 529 (1890); *Cowles* v. *Mercer County,* 7 Wall. 118 (1869). The original source of this latter principle was the rule that corporations are citizens of the State in which they are formed, and are subject as such to the diversity jurisdiction of the federal courts.[39] See, *e. g., Louisville, C. & C. R. Co.* v. *Letson,* 2 How. 497, 558–559 (1844); *Barrow S. S. Co.* v. *Kane,* 170 U. S. 100, 106 (1898). Thus, in the seminal case of *Cowles* v. *Mercer County, supra,* the Court held without hesitation that an Illinois county, which under Illinois law was a "body politic and corporate" and had been authorized to sue and be sued, was subject to federal diversity jurisdiction as a citizen of the State of Illinois.[40] The principle first announced in *Cowles* has become so firmly rooted in federal law that we were able to say only last Term that "[i]t is well settled that for purposes of diversity of citizenship, political subdivisions are citizens of their respective States . . . ." *Illinois* v. *City of Milwaukee,* 406 U. S. 91, 97 (1972).

The County in this case contends, however, that unlike the counties of most States, it is not a municipal corporation or an otherwise independent political subdivision, but that it is, under California law, nothing more than an agent or a mere arm of the State itself. In particular, the County cites to us Art. 11, § 1 (a), of the California Constitution which provides that "[t]he State is divided into counties which are legal subdivisions of the State." The County thus apparently believes its status, for purposes of the diversity jurisdiction, to be governed by *Postal Telegraph Cable* rather than by *Cowles* and its progeny. Despite the County's contentions, a detailed examination of the relevant provisions of California law—beyond simply the generalization contained in Art. 11, § 1, of the state constitution—convinces us that the County cannot be deemed a mere agent of the State of California.

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[39] Under 28 U. S. C. § 1332 (c), a corporation is, of course, also a citizen of "the State where it has its principal place of business."

[40] Indeed, Mercer County was able to point to a provision of state law that limited liability of Illinois counties to suit in the circuit courts of the county itself. Nevertheless, this Court concluded that "no statute limitation of suability can defeat a jurisdiction given by the Constitution," 7 Wall. 118, 122. Moreover, subsequent to *Cowles,* the Court ruled that a county was subject to diversity jurisdiction even where there was no state statute under which counties were authorized to sue and be sued. See *Chicot County* v. *Sherwood,* 148 U. S. 529, 531, 533–534 (1893).

Most notably, under California law a county is given "corporate powers" [41] and is designated a "body corporate and politic." [42] In this capacity, a county may sue and be sued,[43] and, significantly for purposes of suit, it is deemed to be a "local public entity" [44] in contrast to the State and state agencies.[45] In addition, the county, and from all that appears the county alone,[46] is liable for all judgments against it and is authorized to levy taxes to pay such judgments.[47] A California county may also sell, hold, or otherwise deal in property,[48] and it may contract for the construction and repairs of structures.[49] The counties also are authorized to provide a variety of public services such as water service, flood control, rubbish disposal, and harbor and airport facilities.[50] Financially, the counties are empowered to issue general obligation bonds [51] payable from county taxes.[52] Such bonds create no obligation on the part of the State, except that the State is authorized to intervene and to impose county taxes to protect the bondholders if the county fails to fulfill its obligations voluntarily.[53] In sum, these provisions strike us as persuasive indicia of the independent status occupied by California counties relative to the State of California.

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[41] See Cal. Govt. Code § 23000.

[42] See *id.*, § 23003.

[43] See *id.*, §§ 945, 23004 (a).

[44] See *id.*, § 940.4.

[45] *See id.*, § 940.6.

[46] Thus, any liability on the part of the County as a result of this suit would be the County's alone; no obligation would arise with respect to the State.

[47] See Cal. Govt. Code § 50171.

[48] See *id.*, §§ 23004 (d), 25520–25539.

[49] See *id.*, §§ 23004 (c), 25450–25467.

But even if our own examination were not sufficient for present purposes, we have the clearest indication possible from California's Supreme Court of the status of California's counties. In *People ex rel. Younger* v. *County of El Dorado,* 5 Cal. 3d 480, 487 P. 2d 1193 (1971), the Attorney General of the State sought a writ of mandate against two California counties to compel them to pay out certain allotted monies. Under state law, such a writ may be issued only to any "inferior tribunal, *corporation,* board, or person." Cal. Civ. Proc. Code § 1085 (emphasis added). In holding that the writ could be issued against the counties, the California Supreme Court said:

> "While it has been said that counties are not municipal corporations but are political subdivisions of the state for purposes of government . . . , *counties have also been declared public corporations or quasi-corporations.* . . . In view of Government Code section 23003, which provides that a county is 'a body corporate and [politic],' and section 23004, subdivision (a) of the same code, which states that

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[50] See *id.,* §§ 25690-26224.

[51] See *id.,* §§ 29900-29929.

[52] See *id.,* §§ 29922-29924.

[53] See *id.,* §§ 29925-29927.

> counties may sue and be sued, we think that a *county is sufficiently corporate in character* to justify the issuance of a writ of mandate to it." 5 Cal. 3d, at 491 n. 12, 487 P. 2d, at 1199 n. 12 (emphasis added).

See also *Pitchess* v. *Superior Court,* 2 Cal. App. 3d 653, 656, 83 Cal. Rptr. 41, 43 (1969).

We do not lightly reject the Court of Appeals' previous conclusion that California counties are merely part of the State itself and as such are not citizens of the State for diversity purposes.[54] But in light of both the highest state court's recent determination of the corporate character of counties and our own examination of relevant California law, we must conclude that this County has a sufficiently independent corporate character to dictate that it be treated as a citizen of California under our decision in *Cowles* v. *Mercer County, supra.*

Thus, we hold that petitioner Moor's state law claim against the County is within the diversity jurisdiction.

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[54] We do think it bears noting, though, that the Court of Appeals, in initially concluding in *Miller* v. *County of Los Angeles,* 341 F. 2d 964 (CA9 1965), that California counties were not citizens for diversity purposes, made no effort to analyze independently the status of California counties but simply rested its decision on its prior opinion in *Lowe* v. *Manhattan Beach City School Dist.,* 222 F. 2d 258, 259 (CA9 1955). *Lowe* in fact did not involve a suit against a California county but rather a suit against a California school district. And, in *Lowe* the Court of Appeals did not undertake any analysis of the legal character of even California school districts—much less California counties—but instead rested its decision on the equally conclusory order of the District Court, see *Lowe* v. *Manhattan Beach City School Dist.,* No. 16646–WM Civil (SD Cal. 1954), reprinted in Brief for Petitioners Appendix A. Moreover, district courts in States other than California within the Ninth Circuit have questioned the correctness of *Lowe* and *Miller,* and have refused to follow those decisions for counties of their own States. See *Universal Surety Co.* v. *Lescher & Mahoney, Arch. & Eng.,* 340 F. Supp. 303 (Ariz. 1972); *White* v. *Umatilla County,* 247 F. Supp. 918 (Ore. 1965).

Accordingly, we reverse the judgment of the Court of Appeals in this respect and remand this case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

The claims in the instant actions arose out of the May 1969 People's Park disturbance, in which petitioners were allegedly injured by an Alameda County deputy sheriff who was performing duties at that time on behalf of the County. Petitioners brought actions against several deputies, the sheriff, and the County. The complaints against the County alleged federal causes of action under the Civil Rights Acts, 42 U. S. C. §§ 1981, 1983, 1985, 1986, 1988, and pendent state claims under § 810 *et seq.* of the California Government Code. Both federal and state causes of action were premised on the theory that the County could be held vicariously liable for the acts of the deputies. The County subsequently filed motions to dismiss the claims against it in each case, contending that, as to the Civil Rights Act claims, the County was not a "person" who could be sued under the Act. The trial court ultimately granted these motions and ordered that all claims against the County be dismissed. The Court of Appeals affirmed these orders of the District Court, *Moor* v. *Madigan,* 458 F. 2d 1217 (CA9).

Title 42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-

> jured in an action at law, suit in equity, or other proper proceeding for redress."

In *Monroe* v. *Pape,* 365 U. S. 167, we held that a municipality was not a "person" within the meaning of that Act. The issue was whether or not the Act made municipalities liable in damages, *id.,* at 187–191, that claim being strongly pressed because "private remedies against officers for illegal searches and seizures are conspicuously ineffective and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level." *Id.,* at 191. We certainly said, as the Court holds, that a municipality was not a "person" within the meaning of § 1983. *Ibid.* But § 1983 permits equitable relief, as well as damages, not directly involved in *Monroe* v. *Pape* but a matter we explored at some length last Term in *Mitchum* v. *Foster,* 407 U. S. 225.

There may be overtones in *Monroe* v. *Pape* that even suits in equity are barred. Yet we never have so held. Certainly a residuum of power seems available in § 1983 to enjoin such bizarre conduct as the offering to the police of classes in torture. More realistically, § 1983 as construed in *Mitchum* v. *Foster* might under some circumstances authorize a federal injunction against a municipal prosecution of an offender. Such being my understanding of *Monroe* v. *Pape* and *Mitchum* v. *Foster,* I would hold that the County of Alameda in this case is a "person" within the meaning of § 1983 for a narrow group of equity actions and that therefore the District Court did not lack jurisdiction.

Although the complaint in the instant action asked for damages, it also prayed for any further relief that the court might deem just and proper. Since the complaint was dismissed at the threshold of the litigation, it is impossible to determine whether or not grounds for equitable relief would have emerged during the normal course of the litigation. But the prayer for any "further relief" would embrace it.

In any event an amended complaint could make the matter clear beyond peradventure.

That raises the question as to the liability of the County of Alameda, by reason of 42 U. S. C. § 1988, which reads:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Under California law "[a] public entity may sue and be sued." (Govt. Code § 945), although a public entity has a general immunity from suit involving injury. *Id.*, § 815. Moreover, an officer, while generally immune, may become liable in damages, if he uses unreasonable force against a citizen, in which event the municipality loses its immunity. That at least is the way I read *Scruggs* v. *Haynes,* 252 Cal. App. 2d 256, 60 Cal. Rptr. 355.

Since § 1983 does not allow damages against the municipality in a federal suit, federal laws "are not adapted to the object," and are "deficient in the provisions necessary to furnish suitable remedies," within the meaning of § 1988. While it is "inconsistent" with the "laws of the United States," as those words were used in § 1988, to enforce a *federal cause* of action for damages against the County of Alameda, it arguably is within the scheme of the *state cause* of action. This is not to allow state law to enlarge the scope of § 1983. Section 1983 by reason of its equity provision merely gives "jurisdiction" to the District Court, while § 1988 allows the District Court to apply state law.

As we said in *Mitchum* v. *Foster:*

> "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." 407 U. S., at 242.

The federal right here is not to obtain damages but to obtain some kind of equitable relief. Application by the federal court of a state cause of action for damages is therefore in harmony with both § 1983 and § 1988. As we stated in *Sullivan* v. *Little Hunting Park,* 396 U. S. 229, 240, "This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." The federal right here is the alleged "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" as these words are used in § 1983.

FEDERAL MARITIME COMMISSION *v.* SEATRAIN LINES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1647. Argued March 21, 1973—Decided May 14, 1973

In enacting § 15 of the Shipping Act, 1916, Congress conferred on the Federal Maritime Commission (FMC) the power to exempt from the antitrust laws agreements, or those portions of agreements, between carriers that create an ongoing arrangement in which both parties undertake continuing responsibilities, and which therefore necessitate continuous FMC supervision, but not one-time acquisition-of-assets agreements that result in one of the contracting parties ceasing to exist. Pp. 731-746.

148 U. S. App. D. C. 424, 460 F. 2d 932, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Edward G. Gruis argued the cause for petitioner. With him on the briefs was *David Fisher*.

Irwin A. Seibel argued the cause for respondents. With him on the brief for the United States were *Solicitor General Griswold, Assistant Attorney General Kauper,* and *William Bradford Reynolds*. *Marvin J. Coles, Neal M. Mayer,* and *G. Brockwel Heylin* filed a brief for respondent Seatrain Lines, Inc. *Odell Kominers* and *Richard S. Salzman* filed a brief for respondents Pacific Far East Line, Inc., et al.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814, requires all persons subject to the Act to file with the Federal Maritime Com-

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**Lawrence E. Walsh, William F. Ragan,* and *Guy Miller Struve* filed a brief for R. J. Reynolds Tobacco Co. as *amicus curiae*.

mission[1] every agreement within specified categories reached with any other person subject to the Act. The section further empowers the Commission to disapprove, cancel, or modify any such agreement which it finds to be unjustly discriminatory, to the detriment of the commerce of the United States, contrary to the public interest, or violative of the terms of the Act.[2] The Commission is

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[1] Originally, the Shipping Act conferred jurisdiction on the United States Shipping Board. See 39 Stat. 728, 729, 733. Over the years, the jurisdiction here at issue has been shifted to the United States Shipping Board Bureau of the Department of Commerce, see Exec. Order No. 6166, § 12 (1933), the United States Maritime Commission, see 49 Stat. 1985, the Federal Maritime Board, see 64 Stat. 1273, and finally, the Federal Maritime Commission, see 75 Stat. 840. For convenience, we will follow the practice of the parties and the court below and refer throughout to the "Commission."

[2] Section 15 provides in pertinent part:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be condirected to approve all other agreements, and the statute expressly provides that agreements so approved are exempt from the antitrust laws.[3]

The question presently before us is whether a contract which calls for the acquisition of all the assets of one carrier by another carrier and which creates no ongoing obligations is an "agreement" within the meaning of this section. The question is of some importance, since if such contracts are not approved by the Commission, the antitrust laws are fully applicable to them. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213 (1966). Cf. *United States* v. *Borden Co.,* 308 U. S. 188 (1939). But cf. *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474 (1932); *Far East Conference* v. *United States,* 342 U. S. 570 (1952). On the other hand, if they are within the Commission's jurisdiction, the Commission may approve them even though they are violative of the antitrust laws, although the Commission must take antitrust principles into account in reaching its decision. See *Volkswagenwerk Aktiengesellschaft* v. *FMC,* 390 U. S. 261, 273-274 (1968);

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trary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. . . .

. . . . .

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission . . . ."

[3] Section 15 provides that "[e]very agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto." Since the Act makes lawful those agreements approved by the Commission, its effect is to vest the Commission with the power to shield those agreements approved by it from antitrust attack. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213, 216 (1966). But cf. *FMC* v. *Aktiebolaget Svenska Amerika Linien,* 390 U. S. 238, 242-246 (1968).

FMC v. *Aktiebolaget Svenska Amerika Linien,* 390 U. S. 238, 244–246 (1968).

In this case, the Court of Appeals for the District of Columbia Circuit concluded that § 15 did not confer jurisdiction upon the Commission to approve discrete acquisition-of-assets agreements. In so holding, it followed a prior District Court decision in *United States* v. *R. J. Reynolds Tobacco Co.,* 325 F. Supp. 656 (NJ 1971), but declined to follow a Ninth Circuit holding that the Commission had such jurisdiction. See *Matson Navigation Co.* v. *FMC,* 405 F. 2d 796 (CA9 1968). We granted certiorari in order to resolve this conflict and because the case posed an important issue concerning the interface between the antitrust laws and the Commission's regulatory powers. We conclude that in enacting § 15, Congress did not intend to invest the Commission with the power to shield from antitrust liability merger or acquisition-of-assets agreements which impose no ongoing responsibilities. Rather, Congress intended to invest the Commission with jurisdiction over only those agreements, or those portions of agreements, which created ongoing rights and responsibilities and which, therefore, necessitated continuous Commission supervision. We therefore affirm the judgment below.

I

This case was initiated when respondent Seatrain Lines, Inc. (Seatrain) filed a protest with the Commission against an agreement reached between Pacific Far East Lines, Inc. (PFEL) and Oceanic Steamship Co. (Oceanic), both of which are also respondents here, whereby Oceanic agreed to sell all its assets to PFEL. Under the terms of the agreement, Oceanic promised to transfer its entire fleet and all the related equipment together with Oceanic's interest in two container ships then being constructed and all of Oceanic's employees to

PFEL. Although Oceanic did not formally merge with PFEL and retained its corporate existence, it was left as a shell corporation wholly without assets. However, Oceanic undertook no continuing obligation not to re-enter the business and compete with PFEL. On October 6, 1970, Oceanic and PFEL notified the Commission of the agreement, but accompanied the notification with an express statement that, in their view, the agreement was not within the Commission's jurisdiction. The Commission published notice of the agreement, see 35 Fed. Reg. 16114, and allowed 10 days for interested parties to protest and request a hearing. Seatrain filed such a request on October 21, 1970, alleging that it was a potential competitor of PFEL and that the acquisition agreement would have anticompetitive consequences and, hence, was contrary to the public-interest standard of the statute.

Instead of holding a hearing to investigate these allegations, however, the Commission issued a summary order denying the request for an investigation and approving the agreement. The Commission held that "[w]hile section 15 of the Shipping Act, 1916, requires notice and opportunity for hearing, prior to agreement approval, there is no requirement of law that the mere filing of a protest is sufficient to require that a hearing be held before the Commission may grant approval of any protested agreement." Finding that "the likelihood of any impact at all upon [Seatrain's] operations which might result from approval of the agreement is a matter of mere speculation," the Commission concluded that "Seatrain has no standing in this matter, and that its protest is without substance." [4]

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[4] In light of our holding that the Commission lacked jurisdiction over this agreement, we do not decide whether the Commission's decision that Seatrain was not entitled to a hearing would have been proper in a case in which the Commission properly asserted

After Seatrain's petition to reopen was denied, it appealed the Commission's ruling to the Court of Appeals.[5] Seatrain argued that the Commission was required to hold a hearing on its objection, while the United States, as statutory respondent,[6] and Oceanic and PFEL, as intervenors, argued that the Commission lacked jurisdiction over the agreement. In a comprehensive opinion, the Court of Appeals found it unnecessary to reach the hearing issue, since it found that the Commission "lacks jurisdiction under Section 15 of the Shipping Act, 1916, to approve arrangements of the type involved here, which do not require the continued existence or participation of the parties in such arrangements." 148 U. S. App. D. C. 424, 441, 460 F. 2d 932, 949 (1972). The Court therefore vacated the Commission's decision and directed that the agreement be removed from its docket. The case then came here on the Commission's petition for certiorari. 409 U. S. 1058 (1972).

II

At the outset, it must be recognized that the statutory language neither clearly embraces nor clearly excludes discrete merger or acquisition-of-assets agreements. The situation is therefore fundamentally different from that posed in *Volkswagenwerk Aktiengesellschaft* v. *FMC*, relied upon heavily by petitioner, where we held in the context of an ongoing agreement that the Commission's ruling that the agreement was without its § 15 jurisdiction "simply does not square with the structure of the statute." 390 U. S., at 275. In this case, the statute is ambiguous in its scope and must therefore be read in

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jurisdiction. Cf. *Marine Space Enclosures, Inc.* v. *FMC*, 137 U. S. App. D. C. 9, 420 F. 2d 577 (1969).

[5] Direct appeal to the Court of Appeals of final orders of the Commission is authorized by 28 U. S. C. § 2342 (3).

[6] See 28 U. S. C. § 2344.

light of its history and the governing statutory presumptions.

By its terms, the statute requires those covered by it to "file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement . . . or modification or cancellation thereof" which falls into any one of seven categories. These are agreements

> "[1] fixing or regulating transportation rates or fares; [2] giving or receiving special rates, accommodations, or other special privileges or advantages; [3] controlling, regulating, preventing, or destroying competition; [4] pooling or apportioning earnings, losses, or traffic; [5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports; [6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; [7] or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

None of these seven categories expressly refers to a one-time merger or acquisition-of-assets agreement which imposes no continuing obligation and which, indeed, effectively destroys one of the parties to the agreement. The Commission vigorously argues that such agreements can be interpreted as falling within the third category—which concerns agreements "controlling, regulating, preventing, or destroying competition." [7] Without more, we might be inclined to agree that many merger agreements probably fit within this category. But a broad reading of the third category would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed, see, *e. g., United States* v. *McKesson & Robbins, Inc.,* 351 U. S. 305, 316 (1956), and that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350-351 (1963) (footnotes omitted). As we observed only recently: "When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co.* v. *United States,* 410 U. S. 366, 374 (1973). See also *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963); *Pan American World Airways, Inc.* v. *United States,* 371 U. S. 296 (1963); *California* v. *FPC,* 369 U. S. 482 (1962); *United States* v. *Borden Co.,* 308 U. S. 188 (1939). This principle has led us to construe the Shipping Act as conferring only a "limited antitrust exemption" in light of the fact that "antitrust laws represent a fundamental national economic policy." *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S., at 219, 218.[8]

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[7] The Commission's position in this regard is not without irony. In denying Seatrain's application for a hearing and approving the agreement, the Commission held that Seatrain had failed to make sufficient allegations to show that the acquisition of assets would be destructive of competition. Yet the Commission now contends that it had jurisdiction over the agreement because it was one "preventing" competition.

Our reluctance to construe the third category of agreements broadly so as to include discrete merger arrangements is bolstered by the structure of the Act. It should be noted that of the seven categories, six are expressly limited to ongoing arrangements in which both parties undertake continuing responsibilities. Indeed, even the third category refers to agreements "controlling," "regulating" and "preventing" competition—all of which are continuing activities. Only the reference to the destruction of competition supports the Commission's argument that the provision was intended to cover one-time, discrete transactions. But even this reference must be read in light of the final, comprehensive category which refers to agreements "in any manner providing for an exclusive, preferential, or cooperative working arrangement." As the Court of Appeals noted, this last category was clearly meant as a catchall provision, "intended . . . to summarize the type of agreements covered." 148 U. S. App. D. C., at 427, 460 F. 2d, at 935. Cf. *FMB* v. *Isbrandtsen Co.,* 356 U. S. 481, 492 (1958). It is, of course, a familiar canon of statutory construction that such clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated. See 2 J. Sutherland, Statutes and Statutory Construction § 4908 *et seq.* (3d ed. 1943) and cases there cited. Since the summary provision is explicitly limited to "*working* arrangement[s]" (emphasis added), it is reasonable to conclude that Congress intended this limitation to apply to the specifically enumerated categories as well.[9]

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[8] It is true that "antitrust exemption results, not when an agreement is submitted for filing, but only when the agreement is actually approved." *Volkswagenwerk Aktiengesellschaft* v. *FMC,* 390 U. S. 261, 273 (1968). But the fact remains that an expansive reading of the Commission's jurisdiction would increase the number of cases subject to potential antitrust immunity.

This reading of the statute is especially compelling in light of the rest of the statutory scheme, which simply does not make sense if the statute is read to encompass one-time agreements creating no continuing obligations. For example, the statute directs the Commission to "disapprove, cancel or modify any agreement . . . *whether or not previously approved by it,* that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter" (emphasis added). The statute thus envisions a continuing supervisory role for the Commission and invests it with power to disallow an agreement after a period of time even though it had initially been permitted. But it is hard to see how the Commission can exercise this supervisory function when there are no continuing obligations to supervise. And we think it unlikely that Congress intended to permit the Commission to approve acquisition-of-assets agreements, allow them to go into effect, and then, sometime in the indefinite future, resuscitate the expired company and unscramble the assets under its continuing power to disapprove agreements previously approved.

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[9] The statute itself provides no definition of the term "agreement" beyond the statement that "[t]he term 'agreement' in this section includes understandings, conferences, and other arrangements." Although certainly not dispositive, it is at least worthy of note that these synonyms given for "agreement" are all evocative of ongoing activity.

Similarly, the provision in the Act which provides that "[t]he Commission shall disapprove any . . . agreement . . . on a finding of inadequate policing of the obligations under it" makes no sense unless the agreements create continuing obligations to police. The statutory requirement that "continued approval" shall not be permitted for agreements "between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action," suggests an ongoing relationship between the contracting parties. And the requirement that the contracting parties "adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints" can only be understood in the context of a continuing relationship between the contracting parties.

In short, while the statute neither expressly includes nor expressly excludes one-time acquisition-of-assets arrangements, the words must be read in context, and the context makes undeniably clear the ongoing, supervisory role which the Commission was intended to perform. As the Court of Appeals concluded, "[t]he whole structure of Section 15, not only the first paragraph listing the type agreement covered, shows an intent to grant the Commission authority to deal with agreements of a continuing nature." 148 U. S. App. D. C., at 427, 460 F. 2d, at 935.

III

This construction of the Shipping Act is strongly supported by the legislative history of the Act and by Congress' treatment of other industries in contemporaneous and related statutes. As this Court recognized in *FMB* v. *Isbrandtsen Co.,* 356 U. S., at 490, most of the legislative history of the Act is contained in the so-called Alexander Report which culminated a comprehensive investigation into the shipping industry by the House Committee on the Merchant Marine and Fisheries chaired by Congressman Alexander. See House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H. R. Doc. No. 805, 63d Cong., 2d Sess. (1914) (hereinafter Alexander Report). Although legislation designed to carry out the Report's recommendations initially failed to pass, see H. R. 17328, 63d Cong., 2d Sess., a substantially similar bill was enacted in the next Congress and was clearly intended to write the Alexander proposals into law. See H. R. Rep. No. 659, 64th Cong., 1st Sess., 27; S. Rep. No. 689, 64th Cong., 1st Sess., 7.

After examining some 80 steamship agreements and conference arrangements, the Alexander Committee concluded that "practically all the established lines operating to and from American ports work in harmonious cooperation, either through written or oral agreements, conference arrangements, or gentlemen's understandings." Alexander Report 281. The Committee found that this network of agreements, many of them secret, provided a comprehensive system for fixing rates and suppressing competition. See *id.*, at 282–295. As the Committee described the resulting competitive structure of the industry,

> "The primary object of [the] conferences and agreements is to prevent new lines from being organized in a trade and to crush existing lines which refuse to comply with conditions prescribed by the combination, or which, for other reasons, are not acceptable as members of the conference. The methods which have been adopted from time to time to eliminate competition show the futility of a weak line attempting to enter a trade in opposition to the combined power of the established lines when united by agreement. By resorting to the use of the 'fighting ship,' or to unlimited rate cutting, the conference lines soon exhaust the resources of their antagonists. By distributing the loss resulting from the rate war over the several members of the conference, each constituent line suffers proportionately a much smaller loss than the one line which is fighting the entire group. Moreover, the federated lines can conduct the competitive struggle with the comfortable assurance that, following the retirement of the competing line, they are in a position to reimburse themselves through an increase in rates. To allow conferences, therefore, generally means giving the trade to the lines now enjoying it. Only a powerful

> line can hope to fight its way into the trade, and with the inevitable result, if successful, that it will join the combination or be allowed to exist by virtue of some rate understanding." Alexander Report 304–305.

Yet despite these findings, the Committee decided against recommending the outright banning of the conference system. Instead, it chose to place that system under government supervision and to invest an administrative agency with the power to approve or disapprove various conference arrangements. The Committee's reasons for this decision are crucial to the issue presently before us. The Committee found that:

> "[O]pen competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement." *Id.*, at 416.

Thus, the Committee chose to permit continuation of the conference system, but to curb its abuses by requiring government approval of conference agreements. It did so because it feared that if conferences were abolished, the result would be a net decrease in competition through the mergers and acquisition-of-assets agreements that would result from unregulated rate wars. It is readily apparent that the Commission's reading of the statute would frustrate this legislative purpose. The Committee gave the Commission power to insulate certain anticompetitive arrangements in order to prevent outright mergers. Yet the Commission would have us construe this authority in such a way as to allow it to shield the mergers themselves—the very thing which Congress intended to prevent. Cf. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S., at 218–220.

The illogical nature of the Commission's argument is especially apparent when one remembers that at the time the Act was passed, the Commission was arguably not permitted to take antitrust policies into account when ruling on proposed agreements. We have construed the "public interest" standard contained in the Act as requiring the Commission to consider the antitrust implications of an agreement before approving it. See *Volkswagenwerk Aktiengesellschaft* v. *FMC,* 390 U. S., at 274 n. 20; *FMC* v. *Aktiebolaget Svenska Amerika Linien,* 390 U. S., at 242–244. Cf. *Mediterranean Pools Investigation,* 9 F. M. C. 264, 289 (1966). But the "public interest" criterion was not added to the Act until 1961. See 75 Stat. 763. Thus, under the petitioner's interpretation, at the time the Act was passed, the Commission was arguably required to approve merger agreements despite strong antitrust objections to them if the other criteria of the Act were met. We simply cannot believe that Congress intended to require approval of the very arrangements which, as the legislative history clearly shows, it wanted to prevent.

The legislative history also demonstrates that the Alexander Committee used the term "agreements" as a word of art and that mergers and other arrangements creating no continuing rights and obligations were not included within its definition. As the District Court in *United States* v. *R. J. Reynolds Tobacco Co.* observed,

> "The catalog or 'full classification of these agreements' (i. e., the 'agreements' to which the Alexander Committee's attention was primarily directed and to which its recommendations were exclusively directed) does not include a single agreement of merger or other form of corporate reorganization. The 'agreements' represented in the Report are all 'on-going' in nature. Most of these 'agreements' are cooperative working arrangements. These 'agreements' describe practices or regular activities in which two or more shipping companies have agreed to participate over a considerable period of time. None of the 'agreements' studied by the Alexander Committee bears the slightest resemblance to an agreement of merger, which is essentially a single, discrete event, which transforms the relationship of the merging parties at the instant of merger." 325 F. Supp., at 658-659 (footnotes omitted).[10]

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[10] The *Reynolds* court's observations were directed at the Committee's study of foreign trade. In this context, the Committee found that competition was largely frustrated by extensive use of conference arrangements. When the Committee turned to domestic trade, it found that "[u]nlike the practice of water carriers in the foreign trade of the United States, agreements to divide the territory or charge certain rates in the domestic trade are few." Alexander Report 421. Rather, in the domestic arena, the Committee found that competition was controlled largely through mergers, chiefly between railroads and water carriers. The Commission argues from this fact that Congress intended merger agreements to be filed, since the legislation which was ultimately enacted made no distinction between foreign and domestic trade. But throughout the Report whenever the Committee referred to mergers and acquisitions, it distinguished sharply between them and agreements, for which the filing

Moreover, in the few places where the Committee did discuss mergers, it distinguished sharply between such arrangements and the ongoing agreements to which its recommendations were directed. For example, in summarizing its findings the Committee wrote:

> "The numerous methods of controlling competition between water carriers in the domestic trade, referred to in the preceding pages, may be grouped under three headings, viz, (1) control through the *acquisition* of water lines or the *ownership* of accessories to the lines; (2) control through *agreements* or *understandings;* and (3) control through *special practices.*" Alexander Report 409 (emphasis added).

As the *Reynolds* court concluded,

> "Consistently throughout the Report, mergers and other corporate reorganizations, when occasionally mentioned, are referred to by the terms 'consolidation by ownership' and 'control through acquisition,' or variations thereof. Never is the word 'agreement' used in the Report to refer to a merger agreement.

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and approval mechanism was applicable. See the discussion in text. Cf. Note, The Shipping Industry Seeks a Safe Haven: Merger Jurisdiction for the FMC?, 5 Law & Pol. Int'l Bus. 274, 285–286 (1973). Moreover, a careful reading of the Report makes clear that the Committee envisioned other devices for controlling the mergers prevalent in the domestic field. Thus, the Committee noted that the Panama Canal Act of 1912, 49 U. S. C. § 5 (14), already prohibited railroads from owning or controlling water carriers, see *infra,* at 742, and observed that this requirement went "far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States." Alexander Report 422. While the Committee made other recommendations with respect to domestic carriers, these merely paralleled its foreign recommendations and, hence, pertained to "agreements" and "arrangements" rather than "mergers" and "acquisitions" which it thought were sufficiently regulated by existing legislation. See *id.,* at 422–424.

> It is clear that the Alexander Committee distinguished conceptually between agreements in the sense of on-going, cooperative agreements and agreements of 'consolidation' or 'acquisition' (of which merger agreements are a form)." 325 F. Supp., at 659 (footnotes omitted).

Finally, an examination of contemporaneous and related statutes makes clear that when Congress intended to bring acquisitions and mergers under control, it did so in unambiguous language. For example, only a few years prior to passage of the Shipping Act, Congress expressly dealt with mergers involving water carriers. In the Panama Canal Act, 49 U. S. C. § 5 (14), Congress provided that:

> "[I]t shall be unlawful for any carrier [as defined in the Interstate Commerce Act] . . . to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic."

Similarly, when Congress meant to require agency approval for mergers and acquisitions, it did so unambiguously. Thus, the Interstate Commerce Act, 49 U. S. C. § 5 (2)(a)(i) authorizes the Interstate Commerce Commission to give its approval "for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership." In the same manner, the Federal Communications Act, 47 U. S. C. § 222 (b)(1) provides:

> "It shall be lawful, upon application to and approval by the [Federal Communications] Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier."

Examination of the Federal Aviation Act is particularly instructive in this regard. Title 49 U. S. C. § 1382 (a) requires air carriers to file with the Civil Aeronautics Board for prior approval

> "every contract or agreement . . . for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, . . . or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements."

This provision closely parallels § 15 of the Shipping Act, and was obviously modeled after it. Yet Congress clearly thought the provision insufficient to bring discrete merger and acquisition agreements within the Civil Aeronautics Board's jurisdiction, since it enacted another, separate provision requiring Board approval when air carriers "consolidate or merge their properties." 49 U. S. C. § 1378 (a)(1).[11]

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[11] The Commission would have us infer that the 1916 Act conferred jurisdiction upon it from an amendment added in 1950 to § 7 of

IV

In light of these specific grants of merger approval authority, we are unwilling to construe the ambiguous provisions of § 15 to serve this purpose—a purpose for which it obviously was not intended. As the Court of Appeals found, the House Committee which wrote § 15 "neither sought information nor had discussion on ship sale agreements. They were neither part of the problem nor part of the solution." 148 U. S. App. D. C., at 432, 460 F. 2d, at 940. If, as petitioner contends, there is now a compelling need to fill the gap in the Commission's reg-

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the Clayton Act, 15 U. S. C. § 18, as amended by 64 Stat. 1125, 1126. As amended, the provision specifies that:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission . . . the United States Maritime Commission, or the Secretary of Agriculture."

As is clear from the face of the statute, the Act confers no new jurisdiction on any of the listed agencies, but merely provides that mergers already exempt from Clayton Act coverage were to be unaffected by changes in the Act. As this Court held in *California* v. *FPC*, the amended § 7 was "plainly not a grant of power to adjudicate antitrust issues." 369 U. S. 482, 486 (1962). Hence, nothing about the Commission's jurisdiction can be inferred from the inclusion of its predecessor on the list. This view is confirmed by the legislative history of the 1950 amendment. Although acceding to the Commission's request that it be included in the list of agencies left unaffected by the Clayton Act, see Letter of Grenville Mellen, Vice Chairman, United States Maritime Commission, to Senator Herbert O'Conor, Chairman, Senate Subcommittee to consider H. R. 2734, Sept. 29, 1949, reprinted in Brief for Petitioner 52–54, the Committee made explicit that "[i]n making this addition . . . it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess." S. Rep. No. 1775, 81st Cong., 2d Sess., 7 (1950).

ulatory authority, the need should be met in Congress where the competing policy questions can be thrashed out and a resolution found. We are not ready to meet that need by rewriting the statute and legislative history ourselves.

But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. See, *e. g., NLRB* v. *Hearst Publications, Inc.,* 322 U. S. 111 (1944). This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate. In this case, however, there is a disjunction between the abstract principle and the empirical data. The court below made a detailed study of the prior Commission cases relied upon by petitioner to bolster its interpretation of the statute and concluded that none of them involved assertion of jurisdiction over a case such as this, where the agreement in question imposed no ongoing obligations. We find it unnecessary to decide whether every prior case decided by the Commission can be reconciled with our opinion today. It is sufficient to note that the cases do not demonstrate the sort of longstanding, clearly articulated interpretation of the statute which would be entitled to great judicial deference, particularly in light of the clear indications that Congress did not intend to vest the Commission with the authority it is now seeking to assert. As this Court held in a related context,

> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' . . . But the courts are the final authorities on issues of

> statutory construction, *FTC* v. *Colgate-Palmolive Co.,* 380 U. S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown,* 380 U. S. 278, 291." *Volkswagenwerk Aktiengesellschaft* v. *FMC,* 390 U. S., at 272.

In this case, we find that the Commission overstepped the limits which Congress placed on its jurisdiction. The judgment of the Court of Appeals must therefore be

Affirmed.

GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1178. Argued December 5, 1972—Decided May 14, 1973

Following petitioner's application under § 204 of the Federal Power Act to respondent Federal Power Commission (FPC) for authorization of a bond issue, two intervening cities opposed the authorization on the ground that the proceeds of the bond issue would be used to finance or refinance certain anticompetitive activities in violation of the antitrust laws, the Federal Power Act, and the Public Utility Holding Company Act of 1935. Section 204 (a) empowers the FPC to authorize a security issue only if the issue is found to be for some lawful purpose and compatible with the public interest. The FPC granted the cities' petition to intervene, denied their request for a hearing, and authorized the bond issue, holding that the cities' allegations were irrelevant to a requested authorization of securities under § 204. The Court of Appeals remanded the case for consideration of the cities' claim, holding that, in line with the reasoning in *Denver & R. G. W. R. Co.* v. *United States,* 387 U. S. 485, the FPC should have considered the alleged competitive consequences of the bond issue in the § 204 proceeding. *Held:*

1. The FPC, as a general rule, must consider the anticompetitive consequences of a security issue under § 204. Pp. 756-762.

(a) The Federal Power Act did not render antitrust policy irrelevant to the FPC's regulation of the electric power industry. Pp. 757-759.

(b) The fact that the FPC has broad authority under other provisions of the Act to determine whether a public utility's conduct is in the public interest does not mean that the same standard is not equally germane under § 204. P. 759.

(c) Consideration of antitrust policies in the context of § 204 provides a first line of defense against anticompetitive practices that might later become the subject of an antitrust proceeding. P. 760.

(d) The FPC, like the Interstate Commerce Commission, has broad regulatory authority, which includes responsibility for considering antitrust policy in discharging its statutory obligations. Cf. *Denver & R. G. W. R. Co.* v. *United States, supra.* Pp. 760–762.

2. Though the FPC is not necessarily required to hold a hearing or make a full investigation in all cases, its summary disposition of proffered objections to the security issue requires strict scrutiny by a reviewing court in light of the Commission's obligations to protect the public interest and enforçe the antitrust laws. Pp. 762–763.

3. Unexplained summary administrative action is incompatible with the requirements of § 204 and precludes appropriate judicial review. Pp. 763–764.

147 U. S. App. D. C. 98, 454 F. 2d 941, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, *post,* p. 764.

Benny Harry Hughes argued the cause for petitioner. With him on the briefs was *Benjamin D. Orgain.*

Leo E. Forquer argued the cause for respondent Federal Power Commission in support of petitioner. With him on the brief was *George W. McHenry, Jr.*

Robert C. McDiarmid argued the cause for respondent cities of Lafayette and Plaquemine, Louisiana. With him on the brief was *George Spiegel.*

Howard E. Shapiro argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Kauper, Samuel Huntington,* and *Robert B. Nicholson.**

**Howard E. Wahrenbrock* filed briefs for Public Service Company of Indiana, Inc., as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Northcutt Ely* for the American Public Power Assn., and by *Charles J. McCarthy* for Dow Chemical Co.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether, when a public utility applies to the Federal Power Commission for authority to issue a security, as the utility is required to do under § 204 of the Federal Power Act, 49 Stat. 850, 16 U. S. C. § 824c,[1] the Commission, in passing upon the application, must consider the issue's anticompetitive effect in determining whether it is "compatible with the public interest," as that phrase is employed in § 204 (a).

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[1] "§ 824c. Issuance of securities; assumption of liabilities; filing duplicate reports with Securities and Exchange Commission.

"(a) No public utility shall issue any security . . . unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue . . . . The Commission shall make such order only if it finds that such issue . . . (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. . . .

"(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

"(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order."

I

In October 1970, Gulf States Utilities Company applied to the Federal Power Commission for authority to issue for cash, on competitive bidding, $30,000,000 first mortgage 30-year bonds for the purpose of refunding part of Gulf's then-outstanding commercial paper and short-term notes.[2]

Gulf, a Texas corporation qualified to do business in Louisiana, is a public utility within the meaning of § 201 (e) of the Federal Power Act, 16 U. S. C. § 824 (e). It is engaged principally in the business of generating, distributing, and selling electric energy in southeastern Texas and south central Louisiana in an area of approximately 28,000 square miles with a population of about 1,225,000. Gulf sells electric energy at retail in numerous communities in that market and, at the time of the application, was providing electric energy for resale to nine municipal systems, 11 rural electric cooperatives (one serving four municipal systems), and one other utility.

The Commission filed notice of Gulf's application. 35 Fed. Reg. 16649 (1970). Thereupon the cities of Lafayette and Plaquemine, Louisiana (Cities) filed a protest and petition to intervene in the proceedings before the Commission and requested a formal hearing on Gulf's application. The Cities alleged that Gulf, in concert with two other investor-owned utilities, Louisiana Power and Light Company (LP&L) and Central Louisiana Electric Company (CLECO), had engaged in activities "apparently violative of the anti-trust laws," as well as of § 10 (h) of the Federal Power Act, 16 U. S. C. § 803 (h),[3] and of the Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. § 79 *et seq.;* that these activities, in effect, would be "financed or refinanced by the bonds here proposed"; and that the utilities' activities were incompatible with the public interest. The Cities opposed the requested authorization "unless and until Gulf States purges itself of these past violations, or unless the Commission conditions its authorization."

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[2] Gulf, in its Securities and Exchange Commission registration statement for the bonds, stated that the proceeds received from the notes to be refinanced had been used "in connection with the Company's construction program and for other corporate purposes." App. 162. The notes themselves had been issued upon the authority of an uncontested order in FPC Docket E-7509. The Commission in that proceeding authorized a total of $80,000,000 in short-term debt. Only $55,000,000 of this was outstanding at the time of Gulf's bond authorization proceeding. Thus, apart from the bond issue, Gulf could have borrowed another $25,000,000 in short-term credit without further Commission authorization.

The Cities' claim centered on and stressed a 1968 interconnection and pooling agreement between the Cities, Dow Chemical Company, and Louisiana Electric Cooperative, Inc. (LEC). Dow has a plant near the Cities; the plant has generating capacity that could be used by the other members of the pool as emergency stabilizing capacity. LEC is a generation and transmission electric cooperative financed by the Rural Electrification Administration (REA); it is a super-cooperative composed of 12 electric distribution cooperatives, all located in the area served by the three utilities.

In 1964, the REA was considering loans to LEC for the construction of a generation station and transmission lines through which LEC would be able to serve eight of its 12 member organizations. These members were then purchasing their power from the three utilities. The Cities claimed that the three utilities had attempted to destroy LEC, and pointed to a history of "extraordinary litigation" instituted by the utilities between 1964 and 1970 to prevent the construction of the station and the lines, and in fact delaying that construction for five years. The arrangement proposed by the 1968 agreement would assure a market for the parties' surplus capacity and would coordinate, at substantial savings, the construction of new generators by the parties. The three utilities, correspondingly, would lose substantial business if the 1968 arrangement were carried out. Accordingly, Cities alleged, the three utilities engaged in frivolous and repetitive litigation and launched a public relations and lobbying drive against LEC in order to block the loan and prevent fulfillment of the agreement. Cf. *California Transport* v. *Trucking Unlimited,* 404 U. S. 508 (1972).

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[3] "Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

The REA loan was effected, however, in 1969. But by that time the loan was sufficient only for the generating facilities exclusive of the lines. Cities, Dow, and LEC, then were forced to negotiate with the three utilities for the use of the utilities' lines to transmit their power. Cities contended that the three utilities continued, through the course of the negotiations, to block or limit the pool by agreeing only to provide transmission services to some of the pool members; by refusing to supply transmission facilities between pool members unless the 1968 pooling agreement were canceled; and by demanding that LEC limit its power capacity to the wattage already planned, thus giving the three utilities the exclusive right to supply all further power needs of LEC's 12 cooperatives and precluding further expansion by LEC.

Cities, by their proposed intervention, would bring these allegations before the Federal Power Commission in the § 204 proceeding. They claimed that such anticompetitive conduct was properly the subject of a § 204 proceeding and that, under § 204 (b), 16 U. S. C. § 824c (b), the Commission may condition its approval of the bond issue accordingly and place restrictions on Gulf's use of the proceeds.

By its answer, Gulf denied any violation of the antitrust laws, of the Federal Power Act, or of the Public Utility Holding Company Act of 1935. It alleged that the purpose of § 204 of the Federal Power Act was "to prevent unsound financing which might impair the financial integrity of public utilities," and that even if the allegations of the Cities were accepted as true by the Commission, those matters were "irrelevant to this application."

By order issued December 3, 1970, 44 F. P. C. 1524, the Commission granted the Cities permission to intervene. It denied their request for a hearing, however, and it authorized the issuance and sale of the bonds. The order recited:

> "The requested approval of the issuance of the Bonds allow [*sic*] the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [*sic*] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them." *Id.,* at 1525.

The Commission specifically found:

> "The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-

> term indebtedness heretofore authorized by this Commission." *Id.*, at 1526.

The petition for rehearing required by § 313 (a) of the Act, 16 U. S. C. § 825*l* (a), see *Department of Fish & Game* v. *FPC*, 359 F. 2d 165, 168–169 (CA9), cert. denied, 385 U. S. 932 (1966), was filed by the Cities, and was denied.

Review was sought pursuant to § 313 (b) of the Act, 16 U. S. C. § 825*l* (b), in the United States Court of Appeals for the District of Columbia Circuit. A unanimous panel of that court disagreed with the Commission and remanded the case to it for consideration of the claims raised by the Cities, *sub nom. City of Lafayette* v. *SEC*, 147 U. S. App. D. C. 98, 454 F. 2d 941 (1971). The court recognized that the Commission's contention that Gulf's operations "could have no meaningful relation to an application that only sought to replace short-term notes with long term bonds" was "not without appeal, and also not without problems." *Id.*, at 109, 454 F. 2d, at 952. The court concluded, however, that the "cryptic statement of the FPC does not permit us to conclude with reasonable confidence that this was the position taken by the FPC." *Ibid.* It observed that the Commission may have rejected the Cities' allegations out of hand upon the authority of its earlier decision in *Pacific Power & Light Co.*, 27 F. P. C. 623 (1962), a position the Court of Appeals viewed as untenable under this Court's subsequent decision in *Denver & R. G. W. R. Co.* v. *United States*, 387 U. S. 485 (1967).[4]

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[4] Cities also opposed an application of LP&L for approval by the Securities and Exchange Commission of bond and stock issues, the proceeds of which were to be used to repay short-term obligations and for other corporate purposes. Cities contended that the proceeds of these issues would be used for the construction of facilities that would further the unlawful objectives of LP&L, Gulf, and CLEC, and asked that approval by the SEC be conditioned on

Inasmuch as the decision of the Court of Appeals raised issues of potential and recurring importance with respect to the authorization of securities by the Federal Power Commission, we granted certiorari. 406 U. S. 956 (1972). The Commission took the position that the

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cessation of the illegal activities and the establishment of a program to remedy the damage already done.

The jurisdiction of the SEC in this instance was based on §§ 6 and 7 of the Public Utility Holding Company Act of 1935, 15 U. S. C. §§ 79f and 79g, which are part of Tit. I of the Public Utility Act of 1935, 49 Stat. 803, 814–817. Sections 6 and 7 contain a number of requirements that must be met for SEC approval of a security issue. The most relevant of these is in § 7 (d), which requires that the SEC "shall permit a declaration . . . to become effective unless the Commission finds that—. . . (6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

The SEC refused to entertain the Cities' protest, concluding that its authority under § 7 (d)(6) related solely to the terms and conditions of the security to be issued, and did not extend to collateral and unrelated controversies in which LP&L might be engaged. The Cities petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the SEC orders, and the matter was consolidated with the present case. The Court of Appeals affirmed the SEC orders, but remanded Gulf's case to the FPC. It explained this diverse treatment as follows:

"Where an agency has some regulatory jurisdiction over operations, it must consider whether there is a reasonable nexus between the matters subject to its surveillance and those under attack on anticompetitive grounds. But the general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations in view of its authority, *inter alia,* to direct utilities to interconnect on reasonable terms, or to prohibit a utility *from* discriminating in rates and facilities against its municipal customers" 147 U. S. App. D. C. 98, 112–113, 454 F. 2d 941, 955–956 (emphasis in original).

Court of Appeals was in error, but nevertheless opposed the grant.

II

The mandate that § 204 of the Federal Power Act, 16 U. S. C. § 824c, imposes upon the Commission is a broad and impressive one. Section 204 (a) empowers the Commission to authorize the issue of a security by a public utility *only* "if it finds that such issue . . . is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest." This requires the Commission to inquire into and to be satisfied with the purposes of the issue and its lawfulness. And even if its "object" is lawful, the necessary inquiry is not ended, for, in addition, the object must be "compatible with the public interest."

In making its determination under § 204 (a), the Commission is given broad powers of inquiry and enforcement. By § 204 (b) it may hold hearings on the application, may grant the application "in whole or in part," may modify it, and may impose such terms or conditions "as it may find necessary or appropriate." After opportunity for hearing, and for good cause shown, it also may supplement, modify, or condition any previous order "as it may find necessary or appropriate." *Ibid.* Section 204 (c) grants the Commission authority to specify the purpose to which the proceeds of the security may be applied and the amount allowed for that purpose. While, as Gulf observes, §§ 204 (e) and (f) exempt from § 204 (a) certain transactions that concern short-term obligations as well as public utilities that are "organized and operating in a State under the laws of which its security issues are regulated by a State commission," these exemptions[5] do not significantly detract from the sweeping powers and responsibilities of the Commission with respect to public utility security issues generally.

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[5] These exemption provisions have no application to Gulf's security issue challenged by the Cities here.

We are asked to hold that the Commission's responsibilities under § 204 do not extend to consideration on its part of possible anticompetitive consequences flowing from the issuance of a security. Gulf and the Commission both argue that administrative inquiry under § 204 is to be narrowly confined to the prevention of the issuance of a security that might impair the utility's financial integrity or its ability to perform its public utility service and responsibilities. Exactly this interpretation was placed on § 204 by the Commission in 1962 in *Pacific Power & Light Co.*, 27 F. P. C., at 626.[6] Gulf and the Commission contend that antitrust considerations of the kind asserted by the Cities do not fall within the limited scope of § 204 as thus defined, and consideration by the Commission of such broad-ranging issues would be incompatible with the need for relatively fast action by the Commission when it passes upon a proposed security issue. It is said that allegations of anticompetitive conduct properly may be raised and fully considered in other proceedings related to interconnections under § 202 of the Act, 16 U. S. C. § 824a, to dispositions and mergers under § 203, 16 U. S. C. § 824b, to rates and rate-making practices under §§ 205 and 206, 16 U. S. C. §§ 824d and 824e, and to adequacy of service under § 207, 16 U. S. C. § 824f.

Although allegations similar to those raised here may, indeed, be made in such other proceedings under the Federal Power Act, we do not regard that fact as determinative of the scope of Commission inquiry under § 204. Instead, the Commission's broad authority to consider anticompetitive and other conduct touching the "public interest" under the other sections of the Act emphasizes the breadth of its authority under the public interest standard generally and as embodied in § 204. This statute was enacted as part of Tit. II of the Public Utility Act of 1935, 49 Stat. 803, 850. The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce. 49 Stat. 803–804, 847–848; S. Rep. No. 621, 74th Cong., 1st Sess., 1–4, 17–20; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 3, 7–8; *Jersey Central Co.* v. *FPC,* 319 U. S. 61, 67–68 (1943); see *North American Co.* v. *SEC,* 327 U. S. 686 (1946). The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies. See S. Rep. No. 621, *supra,* at 11–12; Utility Corporations—Summary Report, 70th Cong., 1st Sess., S. Doc. No. 92, Part 73–A, pp. 47–54; 79 Cong. Rec. 8392 (1935).

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[6] Cf., however, *Black Hills Power & Light Co.*, 28 F. P. C. 1121 (1962), and 31 F. P. C. 1605 (1964).

In order to achieve federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. II was enacted. S. Rep. No. 621, *supra,* at 17; H. R. Rep. No. 1318, *supra,* at 7. Part II of Tit. II was denominated the Federal Power Act, 49 Stat. 863. Title II certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See *Otter Tail Power Co.* v. *United States,* 410 U. S. 366 (1973); Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy, 72 Col. L. Rev. 64 (1972). This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206, and 207. The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry. Indeed, within the confines of a basic natural monopoly structure, limited competition of the sort protected by the antitrust laws seems to have been anticipated. See *Otter Tail Power Co.* v. *United States, supra,* at 373–374; *California* v. *FPC,* 369 U. S. 482 (1962); S. Rep. No. 621, *supra,* at 12; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., 157–159 (1935); Summary Report, *supra,* at 52; Meeks, *supra.*

Nothing in the Act suggests that the "public interest" standard of § 204 contains any less broad directive than that contained in the other similarly worded and adjacent sections. Under the express language of § 204 the public interest is stressed as a governing factor. There is nothing that indicates that the meaning of that term is to be restricted to financial considerations, with every other aspect of the public interest ignored. Further, there is the section's requirement that the object of the issue be lawful. The Commission is directed to inquire into and to evaluate the purpose of the issue and the use to which its proceeds will be put. Without a more definite indication of contrary legislative purpose, we shall not read out of § 204 the requirement that the Commission consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws. See *FMC* v. *Svenska Amerika Linien,* 390 U. S. 238, 244 (1968); *California* v. *FPC,* 369 U. S., at 484–485; *FCC* v. *RCA Communications, Inc.,* 346 U. S. 86, 94 (1953); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 80 (1944). Cf. Report of National Power Policy Committee on Public-Utility Holding Companies, in S. Rep. No. 621, *supra,* at 55, 59

(App.). Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings. This is particularly significant in the context of a security issue under § 204, for appropriate consideration at a pre-issue stage may avoid the need later to unravel complex transactions in granting relief under the antitrust laws or other sections of the Federal Power Act.

Our conclusion is reinforced by the decision in *Denver & R. G. W. R. Co.* v. *United States,* 387 U. S. 485 (1967). In that case the Court concluded that the Interstate Commerce Commission, in performing its duty under § 20a (2) of the Interstate Commerce Act, 49 U. S. C. § 20a (2), to determine whether the issuance of a particular security is "for some lawful object . . . and compatible with the public interest," is required, as a general rule, to consider the anticompetitive consequences of the issue. Section 204 of the Federal Power Act was modeled upon § 20a of the Interstate Commerce Act. The initial draft of § 204 was without any broad reference to the public interest. Instead, it identified four specific purposes for which a utility could issue a security (property acquisition; expansion or improvement of facilities or service; discharge or lawful refunding of obligations; and reimbursement of other expenditures for such purposes). H. R. 5423, § 206, 74th Cong., 1st Sess., 108–109; S. 1725, § 206, 74th Cong., 1st Sess., 109–110.[7] This provision intentionally was replaced with the broader language now contained in § 204 in order "to attain greater flexibility and workability than would have been possible under the original section. The language defining the purposes for which securities may be issued has been taken substantially from section 20a of the Interstate Commerce Act, which has proved its usefulness." S. Rep. No. 621, *supra,* at 20. There was, thus, a departure from the specific, and a selection of the general. We perceive no reason to view the responsibility placed on the FPC under § 204 differently from the ICC's responsibility under § 20a of the Interstate Commerce Act. Each agency possesses broad regulatory authority. Each is charged with responsibility for considering antitrust policy under its statute. And § 204 and § 20a are virtually identical in language.[8] The fact that the ICC has a specific obligation under § 11 (a) of the Clayton Act, 15 U. S. C. § 21 (a), to enforce § 7 of that Act, as well as a responsibility to advance the National Transportation Policy, did not control the decision in the *Denver* case, see 387 U. S., at 492–493, and the absence of a parallel reference in § 11 of the Clayton Act with respect to the FPC is not to be

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[7] "Sec. 206 (a). No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption of liability is for one or

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more of the following purposes and no others, and is reasonably necessary or appropriate for such purpose or purposes; the acquisition of property; the construction, completion, extension or improvement of the facilities or service of the public utility; the discharge or lawful refunding of its obligations; and the reimbursement of moneys actually expended from sources other than the issue of securities for any of the aforesaid purposes in cases where the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the Commission to ascertain the amount of moneys so expended and the purpose for which such expenditure was made."

The foregoing was the Senate version. Except for one spelling and two punctuational differences, the House version was identical.

[8] The FPC has so recognized. *Pacific Power & Light Co.,* 27 F. P. C. 623, 627 (1962).

deemed controlling. Cf. *California* v. *FPC,* 369 U. S. 482 (1962).

III

Our conclusion that the FPC must consider anticompetitive aspects of a security issue to which § 204 applies does not end the inquiry, for two subordinate questions remain: whether the agency abused its authority in refusing to hold a hearing on the Cities' objections, and whether, on the facts of this case, the Commission improperly rejected the Cities' allegations out of hand on the ground that they were irrelevant to the security issue for which Gulf sought approval.

Gulf asserts that even if the Commission is required to investigate and to consider the Cities' objections under § 204, its refusal to do so here was not error, for the Commission may summarily dispose of objections of this kind without a hearing and extended investigation. Our conclusion that, as a general rule, the Commission must consider anticompetitive consequences of a security issue under § 204 does not mean that the Commission must hold a hearing on objections in every case. Neither does it mean that every allegation must be fully investigated regardless of its facial merit, or that consideration of the allegations may not, in appropriate circumstances, be deferred, or that the major portion of a securities issue may not forthwith be authorized and only the remainder withheld for further study.[9] So strict a rule would unduly limit the discretion the Commission must have in order to mold its procedures to the exigencies of the particular case, and would be unrealistic in the light of the nature of a proceeding under § 204. The need for flexibility, planning, and rapid coordinated action is particularly acute with respect to the sale of a security on the market. But where the Commission summarily disposes of proffered objections, or where it exercises its discretion to approve an issue without considering its anticompetitive consequences, "the reviewing court must closely scrutinize its action in light of the . . . statutory obligations to protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral" or summary treatment. *Denver,* 387 U. S., at 498. *Denver,* as we have noted, concerned the ICC, but the foregoing quotation from that opinion has equally forceful application in the FPC context.

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[9] The Court of Appeals meticulously outlined various options available to the Commission. 147 U. S. App. D. C., at 110–111, 454 F. 2d, at 953–954.

Gulf also strenuously urges that the Commission in fact did consider Cities' allegations, although summarily, and properly rejected them on their merits as having no relation to the security issue or to any possible future anticompetitive conduct in which Gulf might engage. We have noted above that the Court of Appeals observed, 147 U. S. App. D. C., at 109, 454 F. 2d, at 952, that certain aspects of this argument are not without substantial appeal. On the basis of the record before us, we cannot say that, upon consideration of the objections raised by the Cities, the Commission would not be justified in rejecting them summarily. But such summary action may not go unexplained in the face of the statutory obligation placed on the Commission under § 204. The decision the Commission thus far has made provides us with an inadequate explanation of its reasons for disposing of the Cities' objections on their merits, if that in fact is what occurred. We are provided with no explanation of why summary action was warranted, and we are provided with no reason for the Commission's possible conclusion that the objections were meritless.

Without more, we are unable "closely [to] scrutinize" the Commission's action. Nor may we supply an alternative, unstated ground to support an agency's decision if that ground is one that "the agency alone is authorized to make." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943).

The decision of the Court of Appeals in remanding the case to the Federal Power Commission is

Affirmed.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

This case raises the question whether the Federal Power Commission (the Commission) must consider the possible anticompetitive effect of a public utility's application under § 204 of the Federal Power Act, 16 U. S. C. § 824c, for authority to issue a security. Section 204 provides in relevant part that the Commission shall authorize the issuance of a security

> "only if it finds that such issue or assumption (a) is for some *lawful object,* within the corporate purposes of the applicant and compatible with the *public interest,* which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes." 16 U. S. C. § 824c (a) (emphasis supplied).

Rejecting the Commission's own structuring of its responsibilities and repudiating its uniform administrative interpretation for more than a third of a century, the Court today finds implicit in § 204's use of the phrase "the public interest" a duty on the part of the Commission, when acting upon a financing application, to consider any possible anticompetitive effect that may be alleged. As I am persuaded neither by the majority's analysis of the statutory language nor by its discussion of the regulatory context, I remain of the view that the Commission's position is consistent with the statute and I would accord it the deference to which it is entitled.[1] Moreover, for the reasons stated below, I believe that the Court's decision is incompatible with the interest of the public in assuring that utilities are enabled to meet their necessary requirements for capital upon the most favorable terms. Accordingly, I dissent.

I

The present proceedings were initiated on October 12, 1970, when Gulf States Utilities Co. (Gulf States) filed an application under § 204 seeking authority to sell $30 million of first mortgage bonds at competitive bidding. The stated purpose for the issuance was to pay off part of its commercial paper and short-term notes, whose issuance previously had been approved by the Commission.

The cities of Lafayette and Plaquemine, Louisiana (the Cities), filed a motion to intervene on November 2, alleging a continuing conspiracy among Gulf States, Louisiana Power & Light Co., and Central Louisiana Electric Co. to block the implementation of an Interconnection and Pooling Agreement which would link the Cities, Dow Chemical Co., and Louisiana Electric

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[1] The interpretation is entitled to great deference:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon,* 329 U. S. 143, 153." *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965).

Cooperative, Inc. (the Cooperative). The Cooperative had applied in 1964 to the Rural Electrification Administration for a loan to build a generating facility and transmission lines. The Cities contended that Gulf States and its coconspirators had used a number of techniques, including frivolous litigation, to delay approval of the loan until 1969, with the result that the amount of the loan no longer sufficed to build transmission lines as well as a generating plant. The Cooperative was thus forced to rely for transmission services on Gulf States, which, allegedly, would agree to sell them only if the Cooperative would restrict the scope of its operations. The Cities asserted, finally, that the proceeds from the present bond issue would in some way support Gulf State's anticompetitive actions.[2]

On December 3, the Commission granted the Cities' motion to intervene, but declined to hold a hearing on their allegations. The Commission's order explained more fully:

> "The requested approval of the issuance of the Bonds allow[s] the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [*sic*] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any

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[2] It was stated in petitioner's brief, and was not challenged, that the Commission records fail to show any other like petition to intervene in a financing application under § 204 since its enactment in 1935. The remedy which intervenors are seeking to establish is a new one not heretofore deemed necessary or appropriate by anyone. Brief for Petitioner 26.

> effect on the interest of the Petitioners, or solve any of the problems outlined by them." 44 F. P. C. 1524, 1525.

In the same order, the Commission authorized the issuance and sale of the bonds. It subsequently modified the order in respects not relevant here and denied a petition for rehearing.

Reviewing the Commission's order at the behest of the Cities, the Court of Appeals held that in a § 204 application proceeding the Commission must consider claims of anticompetitive conduct when urged by intervenors. 147 U. S. App. D. C. 98, 454 F. 2d 941 (1971). While the court's ruling was flexible in terms, allowing the Commission to reject without a hearing claims which are "insubstantial or barren" or lack a "reasonable nexus" with the purpose of the securities issuance, it required an explanation "supported in the record," presumably something in addition to that offered by the Commission in this case. 147 U. S. App. D. C., at 110, 454 F. 2d, at 953.[3]

II

It is common ground that the Commission has a responsibility to deal with anticompetitive practices in the power industry. Section 10 of the Act, 16 U. S. C. § 803, provides that the Commission may issue licenses to public utilities "on the following conditions," one of which is that:

> "(h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix,

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[3] One would have thought that by its use of the phrase "irrelevant to a requested authorization of securities," 44 F. P. C. 1524, 1525, the Commission had already found—to use the language of the court—that the claims lacked a "reasonable nexus" with the purpose of the securities issuance.

> maintain, or increase prices for electrical energy or service are hereby prohibited." 16 U. S. C. § 803 (h).

The question before the Court, then, is not whether the Commission has responsibility, but how and when it shall exercise it.

Stated abstractly, the Commission's position is that the most sensible method of regulating anticompetitive conduct is to focus on the conduct itself rather than on the means by which it may possibly be financed. The Commission acknowledges a duty to scrutinize allegedly anticompetitive behavior in proceedings: to order an interconnection, § 202 of the Act, 16 U. S. C. § 824a; to approve an acquisition or merger, § 203 of the Act, 16 U. S. C. § 824b; to review rates, §§ 205 and 206 of the Act, 16 U. S. C. §§ 824d and 824e; and to review a charge of unduly discriminatory rates or practices, § 205 of the Act, 16 U. S. C. § 824d, or of inadequate service, § 207 of the Act, 16 U. S. C. § 824f. Additionally, the Commission may investigate unlawful conduct upon a complaint by "[a]ny person, State, municipality, or State commission," § 306 of the Act, 16 U. S. C. § 825e, or on its own motion, § 307 of the Act, 16 U. S. C. § 825f. Indeed, upon the complaint of the respondent Cities, the Commission is presently investigating the conduct at issue here. *The Cities of Lafayette and Plaquemine, Louisiana* v. *Gulf States Utilities Co.*, F. P. C. Doc. No. E-7676.[4]

Given its broad direct authority and its undertaking to investigate allegations of anticompetitive behavior in exercising that authority, the Commission does not think it necessary or appropriate to convert § 204 into an all-purpose sword.[5] As the Court of Appeals recognized, there may be no nexus or only a very weak one between the issuance of a security and alleged anticompetitive conduct and, in any event, the charges may be unfounded. It is no answer, in the Commission's view, to say that nexus and merit must be determined on the facts of each case because the process of investigating the allegations will delay the financing and often frustrate the utilities' efforts to obain a favorable price for their securities.

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[4] Nor does the Commission have exclusive jurisdiction over antitrust violations by utilities. Antitrust suits may be brought by private parties or by the Antitrust Division of the Justice Department and afford other means of relief.

The Commission is properly sensitive to the complexities and subtleties of raising vast sums of money in the financial markets.[6] Utility financing normally is accomplished through competitive bidding participated in by a relatively small number of national investment firms which specialize in the purchase from issuers and the wholesaling of utility securities. The market is highly competitive and is particularly sensitive to uncertainties. The maintenance of an orderly market, with dependable marketing timetables, is essential to the financing process and to favorable decisions by the investment bankers as to rates and other terms. It is settled practice to "bring an issue to market" pursuant to a carefully structured time schedule. When favorable market conditions are observed or anticipated, this time schedule is compressed usually within a period from 45 to 90 days. The longer the lead time is extended and uncertainties injected into the process, the greater the risk of market change or re-evaluation with a resulting adverse effect on the cost of capital and, in the end, on the cost of service to the public. Indeed, the public has a double interest in this process. Apart from the ultimate impact on rates which may be occasioned by disruption of the financing process, the utilities may simply be unable to keep pace with the burgeoning public demand for electric energy.[7]

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[5] In *Pacific Power & Light Co.,* 27 F. P. C. 623 (1962), the Commission took the same position under analogous circumstances. There, the Commission approved a proposed issuance of securities to fund construction of a politically controversial transmission line, stating:

"The plain purpose of Section 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities." *Id.,* at 626.

[6] The Commssion has recognized the importance of expedition and adherence to time schedules in the administration of § 204 of the Act:

"It should also be observed that procedures for considering security issues must be expeditious if, in view of changing marketing conditions, utilities are to be able to raise the money needed to carry out their responsibilities. . . ." *Id.,* at 629.

Both the delicacy of financing and the availability of alternative means for regulating anticompetitive conduct, then, strongly support the Commission's interpretation of the Act. Nor does anything in the legislative history of § 204 require a contrary conclusion.[8] The Senate Report states straightforwardly:

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[7] Prof. Priest has commented on the urgency of new capital for the electric industry:

"Since World War II, the problem of new capital has been, and will continue to be, compellingly urgent for public utility managements." A. Priest, 1 Principles of Public Utility Regulation 451 (1969).

After describing the "spectacular" growth of the electric utility industry, Prof. Priest compared the urgency of access to the capital markets of utilities with industrial enterprises:

"[T]he new capital requirements of the utility industry in the next ten years will call for extraordinary effort. The obvious reasons are (1) that regulated public utilities literally cannot produce as much cash through retained earnings as unregulated industrial enterprises and (2) that the utilities, in any event, need a much larger investment per dollar of annual revenue than the characteristic industrial." *Id.*, at 452.

It is stated in petitioner's brief, and not questioned, that in 1971, 43 applications were filed with the Commission covering the issuance of nearly $1.8 billion of securities. Brief for Petitioner 24.

> "Control over the capitalization of operating utilities is plainly an essential means of safeguarding the public against the *unsound financial practices* which make impossible the proper and most economical performance of public-utility functions." S. Rep. No. 621, 74th Cong., 1st Sess., 50 (1935) (emphasis supplied).

And in companion legislation entrusting to the Securities and Exchange Commission (SEC) the responsibility to regulate the issuance of securities by public utility holding companies, Congress declined to require the SEC to investigate anticompetitive conduct, at least in the ordinary case.[9] Even apart from its relevance to congressional purpose, the absence of a requirement for such an investigation when a public utility holding company seeks authorization to issue a security supports the Commission's prudent judgment to accord like treatment to applications from operating utilities.

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[8] Section 204 was enacted as part of Tit. II of the Public Utility Act of 1935. Title II amended the Federal Water Power Act and redesignated it the Federal Power Act.

[9] The Public Utility Holding Company Act was enacted as Tit. I of the Public Utility Act of 1935. See n. 8, *supra*. Under § 7 (d) (6) of the Public Utility Holding Company Act, the SEC is directed to disapprove an issue of securities if its terms and conditions are "detrimental to the public interest or the interest of investors or consumers." 15 U. S. C. § 79g (d)(6). The SEC has interpreted this language as not requiring it to investigate alleged anticompetitive conduct, and applied this interpretation in an aspect of this litigation involving a substantially identical challenge by these same Cities to a proposed issuance of securities by Louisiana Power & Light Co., a public utility holding company which allegedly conspired with Gulf States. See *ante*, at 754–755, n. 4. The SEC rejected the Cities' protests as pertaining to "collateral and unrelated controversies," 147 U. S. App. D. C., at 103, 454 F. 2d, at 946, and was upheld by the Court of Appeals. *Id.*, at 112, 454 F. 2d, at 955.

The securities of public utility holding companies compete in the financial markets with the securities of public utility operating companies. It makes little sense, especially in construing companion legislation applicable to the same industry, to construe the term "public interest" when applied to the operating companies to mean something different, and to impose a more burdensome procedure, than when applied to utilities which are within a holding company system.[10] Yet, this will be the bizarre result of today's decision by this Court.

III

The Court rests its decision in part on *Denver & R. G. W. R. Co.* v. *United States*, 387 U. S. 485 (1967), a case involving the issuance of a controlling stock interest in a carrier regulated by the Interstate Commerce Commission (ICC). In my view, that case falls far short of being a persuasive precedent. The transaction under consideration there was a proposed issuance of common stock by the Railway Express Agency (REA). Approximately 2,000,000 shares of REA stock were held exclusively by railroads, each of which was obligated to offer its shares to the others before selling them to outsiders. REA also was authorized to issue 500,000 shares to whomever it wished, and it entered into an agreement to sell such shares to Greyhound on the condition that

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[10] Further evidence of congressional intent can be gleaned from the fact that Congress exempted from scrutiny under § 204 securities of "a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission." § 204 (f) of the Act, 16 U. S. C. § 824c (f). At the time of the Act, 32 States regulated the issuance of utility company securities. 79 Cong. Rec. 10378 (1935). Had Congress intended to subject securities issues to antitrust screening, it would not, presumably, have established this exception.

Greyhound would offer to purchase an additional 1,000,000 shares from present stockholders, the offer to remain open for 60 days.

As required by § 20a of the Interstate Commerce Act, 49 U. S. C. § 20a, REA applied to the ICC for authorization to issue the 500,000 shares. Under the terms of that section, the ICC may grant authorization "only if it finds that such issue . . . is for some lawful object within [the applicant's] corporate purposes, and compatible with the public interest . . . ." 49 U. S. C. § 20a (2). The ICC authorized the issue without granting a hearing on an intervenor's claim that issuance to Greyhound would give it "control" over REA, or, at a minimum, would lead to a lessening of competition in the freight transportation market. On review in this Court, the ICC argued that its responsibility under § 20a was limited to protecting against financial manipulation, but that even if it did have an obligation to consider "control" and "anticompetitive" effects of the issuance, it could properly defer such consideration until the expiration of Greyhound's offer to purchase a large additional portion of REA's outstanding stock. 387 U. S., at 491–492.

In addressing the ICC's first contention, the Court gave scant attention to the legislative history of § 20a. After noting that an earlier version of what was to become the Interstate Commerce Act "led to a study which condemned as a 'public evil' intercorporate holdings of railroad stock," *id.*, at 492 n. 4, the opinion shifted focus:

> "Even if Congress' primary concern was to prevent [fiscal] manipulation, the broad terms 'public interest" and 'lawful object' negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws." *Id.*, at 492.

One of the ICC's responsibilities, the Court found, was to consider possible control and anticompetitive consequences, a responsibility deriving specifically from § 5 of the Interstate Commerce Act, 49 U. S. C. § 5, and from § 11 of the Clayton Act, 15 U. S. C. § 21. Under § 5, any conjoining of two or more carriers, either by merger or by transfer of a controlling interest of stock, must be submitted for approval to the ICC, whose approval confers antitrust immunity. Section 11 of the Clayton Act grants to the ICC authority to enforce compliance with the antitrust provisions of § 7 of the same Act, 15 U. S. C. § 18, which prohibit the acquisition by one corporation of the stock or the assets of another where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." On the facts before it, the Court saw no abuse of discretion in the ICC's decision to postpone consideration of possible control of REA by Greyhound until the expiration of Greyhound's 60-day offer, but held it an abuse of discretion to defer consideration of a possible § 7 violation.

Section 20a of the Interstate Commerce Act, interpreted in *Denver*, was, as the majority points out, the model for § 204 of the Federal Power Act.[11] But this tie by no means requires that the two sections be given identical constructions.[12] The *Denver* case involved a different statute and regulatory framework, with a different administrative history.[13] Moreover, the transaction involved in *Denver,* Greyhound's purchase of stock in a regulated carrier, was arguably a *per se* violation of the antitrust laws: the effect of the acquisition might have been "substantially to lessen competition, or to tend to create a monopoly" in violation of § 7 of the Clayton Act. As indicated above, the legislative history of the Interstate Commerce Act showed particular concern with "intercorporate holdings of railroad stock." The immediacy of the antitrust issue and the obligation imposed by § 5 on the ICC with respect to Clayton Act violations justified the Court in overriding the ICC's decision not to address the issue.

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[11] The Senate Report indicated that § 204

"follows section 20a of the Interstate Commerce Act in defining the conditions under which such authorization is to be given, the Commission's power to issue orders and the duty of the public utilities to comply with such orders." S. Rep. No. 621, 74th Cong., 1st Sess., 50 (1935).

[12] One can hardly suppose that Congress in 1935 specifically intended to borrow the words of § 20a as they would be construed by this Court in 1967. Congress borrowed the language as it was then understood, because it had "proved its usefulness." *Id.*, at 20.

Moreover, Congress departed from the Interstate Commerce Act model when it established an exception for state-regulated securities, see n. 10, *supra*, an exception which is not found in the Interstate Commerce Act.

In sum, *Denver* has little precedential weight in a case under the Federal Power Act, especially where the transaction does not involve on its face an arguable violation of the antitrust laws.

IV

I return now to the facts in this case. The relationship between Gulf States' proposal to sell bonds for cash on the open market and the anticompetitive activities alleged by the Cities is, at best, an attenuated one. Indeed, the Cities do not claim that the issuance itself will have an anticompetitive effect. Nor do they claim that the simple refunding of obligations will have such an effect. Their assertion of a relationship barely goes beyond a bald insistence that the anticompetitive conduct alleged will be "financed or refinanced by the bonds here proposed." Brief for Respondent Cities 9. Their focus consistently has been not so much on the uses to which the proceeds from the bonds will be put as on the conditions which the Commission might impose on their issuance. Indeed, the Commission believes that the lack of a substantial relationship between the Cities' allegations and petitioner's bond issue is characteristic of the lack of nexus between § 204 financing proposals generally and anticompetitive conduct by utilities.[14]

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[13] No less important are the practical differences between utility and railroad financing. Because for several decades the railroads have contracted rather than expanded facilities and services, they have for the most part been able to meet their capital needs from retained earnings and equipment trust financing without resorting to the national markets for additional capital:

"Railroads may not enlarge their trackage significantly and may continue to rely largely on internal resources and the ubiquitous equipment trust to finance additional and more efficient rolling stock. But the electric, natural gas, communications, and water industries, as well as the airlines, must go to the investment fraternity for staggering amounts." Priest, *supra,* n. 7, at 451.

This, then, is a particularly unlikely case in which to force the Commission to investigate allegations of anticompetitive conduct. The Court apparently considers that the Cities' claim of anticompetitive conduct is at least colorably relevant to the proposed refinancing. If so, it is unlikely that any claim can be found wholly irrelevant. On the basis of today's precedent, the only justification reasonably open to the Commission for refusing to consider allegations of anticompetitive conduct will be that the allegations themselves are patently false.

If the field of inquiry is, as the Cities insist, all of a utility's proposed actions and all of its past actions as they reflect on its proposed actions, it should be no difficult task for an intervenor to force a hearing and findings of fact. As the present case amply demonstrates, the questions of fact may be complicated ones unsuited to summary adjudication. If the Commission finds no anticompetitive conduct, the intervenor will remain free to seek judicial review of the Commission's findings, and thereby cause further delay.

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[14] It is worthy of note that a transaction between two public utilities resembling the transaction proposed in *Denver & R. G. W. R. Co.* would be submitted to the Commission, not under § 204, but under § 203, which provides in pertinent part that:

"(a) No public utility shall . . . purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so." 16 U. S. C. § 824b.

In passing on an application under § 203, the Commission would investigate charges of anticompetitive practices. See *supra,* at 768. Thus the specific problem addressed by the Court in *Denver* would not arise under § 204.

In converting a special-purpose proceeding into a general-purpose one, the Court renounces an administrative interpretation of § 204 founded on the practicalities of utility financing and regulation.[15] Although other established means are available for policing anticompetitive conduct,[16] the Court imposes fresh and ill-defined obstacles to the necessary raising of capital by an industry that needs an expeditious and dependable regulatory process. And, finally, in the name of the "public interest," it ignores the critical fact that mandating a prolonged factfinding process will preclude the Commission from vindicating those aspects of the public interest peculiarly implicated by financing proposals.

I would uphold the Commission and would reverse the decision of the Court of Appeals.

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[15] I would not foreclose the possibility that the Commission should consider in the context of a § 204 application an allegation that the issuance of the security was itself an antitrust violation. But see n. 14, *supra*. The present case is not remotely of this type.

[16] See n. 4, *supra*.

GAGNON, WARDEN *v.* SCARPELLI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-1225. Argued January 9, 1973—Decided May 14, 1973

Respondent, a felony probationer, was arrested after committing a burglary. He admitted involvement in the crime but later claimed that the admission was made under duress and was false. The probation of respondent, who was not represented by an attorney, was revoked without a hearing. After filing a habeas corpus petition, he was paroled. The District Court concluded that revocation of probation without hearing and counsel was a denial of due process. The Court of Appeals affirmed. *Held:*

1. Due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in *Morrissey* v. *Brewer,* 408 U. S. 471, in the case of a parolee. Pp. 781-782.

2. The body conducting the hearings should decide in each individual case whether due process requires that an indigent probationer or parolee be represented by counsel. Though the State is not constitutionally obliged to provide counsel in all cases, it should do so where the indigent probationer or parolee may have difficulty in presenting his version of disputed facts without the examination or cross-examination of witnesses or the presentation of complicated documentary evidence. Presumptively, counsel should be provided where, after being informed of his right, the probationer or parolee requests counsel, based on a timely and colorable claim that he has not committed the alleged violation or, if the violation is a matter of public record or uncontested, there are substantial reasons in justification or mitigation that make revocation inappropriate. Pp. 783-791.

3. In every case where a request for counsel is refused, the grounds for refusal should be stated succinctly in the record. P. 791.

454 F. 2d 416, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a statement dissenting in part, *post*, p. 791.

William A. Platz, Assistant Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs was *Robert W. Warren,* Attorney General.

William M. Coffey, by appointment of the Court, 408 U. S. 921, argued the cause and filed a brief for respondent.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the related questions whether a previously sentenced probationer is entitled to a hearing when his probation is revoked and, if so, whether he is entitled to be represented by appointed counsel at such a hearing.

I

Respondent, Gerald Scarpelli, pleaded guilty in July 1965, to a charge of armed robbery in Wisconsin. The trial judge sentenced him to 15 years' imprisonment, but suspended the sentence and placed him on probation for seven years in the custody of the Wisconsin Department of Public Welfare (the Department).[1] At that time, he signed an agreement specifying the terms of his probation and a "Travel Permit and Agreement to Return" allowing him to reside in Illinois, with supervision there under an interstate compact. On August 5, 1965, he was accepted for supervision by the Adult Probation Department of Cook County, Illinois.

On August 6, respondent was apprehended by Illinois police, who had surprised him and one Fred Kleckner,

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[1] The Court's order placing respondent on probation provided, among other things, that "[i]n the event of his failure to meet the conditions of his probation he will stand committed under the sentence all ready [*sic*] imposed." App. 10. The agreement specifying the conditions of the probation, duly executed by respondent, obligated him to "make a sincere attempt to avoid all acts which are forbidden by law . . . ." App. 12.

Jr., in the course of the burglary of a house. After being apprised of his constitutional rights, respondent admitted that he and Kleckner had broken into the house for the purpose of stealing merchandise or money, although he now asserts that his statement was made under duress and is false. Probation was revoked by the Wisconsin Department on September 1, without a hearing. The stated grounds for revocation were that:

> "1. [Scarpelli] has associated with known criminals, in direct violation of his probation regulations and his supervising agent's instructions;
> "2. [Scarpelli,] while associating with a known criminal, namely Fred Kleckner, Jr., was involved in, and arrested for, a burglary . . . in Deerfield, Illinois." App. 20.

On September 4, 1965, he was incarcerated in the Wisconsin State Reformatory at Green Bay to begin serving the 15 years to which he had been sentenced by the trial judge. At no time was he afforded a hearing.

Some three years later, on December 16, 1968, respondent applied for a writ of habeas corpus. After the petition had been filed, but before it had been acted upon, the Department placed respondent on parole.[2] The District Court found that his status as parolee was sufficient custody to confer jurisdiction on the court and that the petition was not moot because the revocation carried "collateral consequences," presumably including the restraints imposed by his parole. On the merits, the District Court held that revocation without a hearing and counsel was a denial of due process. 317 F. Supp. 72 (ED Wis. 1970). The Court of Appeals affirmed *sub*

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[2] Respondent was initially paroled to a federal detainer to serve a previously imposed federal sentence arising from another conviction. He was subsequently released from federal custody, but remains a parolee under the supervision of the Department.

nom. Gunsolus v. *Gagnon,* 454 F. 2d 416 (CA7 1971), and we granted certiorari. 408 U. S. 921 (1972).

II

Two prior decisions set the bounds of our present inquiry. In *Mempa* v. *Rhay,* 389 U. S. 128 (1967), the Court held that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Reasoning that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," *id.,* at 134, and that sentencing is one such stage, the Court concluded that counsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case such as the present one, where the probationer was sentenced at the time of trial.

Of greater relevance is our decision last Term in *Morrissey* v. *Brewer,* 408 U. S. 471 (1972). There we held that the revocation of parole is not a part of a criminal prosecution.

> "Parole arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.,* at 480.

Even though the revocation of parole is not a part of the criminal prosecution, we held that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. Specifically, we held that a parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.

Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.[3] Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty.[4] Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey* v. *Brewer, supra.*[5]

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[3] Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole. See, *e. g.*, Van Dyke, Parole Revocation Hearings in California: The Right to Counsel, 59 Calif. L. Rev. 1215, 1241–1243 (1971); Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. Crim. L. C. & P. S. 175, 198 n. 182 (1964).

[4] It is clear at least after *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, 295 U. S. 490, 492 (1935), that probation is an "act of grace."

[5] Petitioner argues, in addition, that the *Morrissey* hearing requirements impose serious practical problems in cases such as the present one in which a probationer or parolee is allowed to leave the convicting State for supervision in another State. Such arrangements are made pursuant to an interstate compact adopted by all of the States, including Wisconsin. Wis. Stat. Ann. § 57.13 (1957). Petitioner's brief asserts that as of June 30, 1972, Wisconsin had a total of 642 parolees and probationers under supervision in other States and that incomplete statistics as of June 30, 1971, indicated a national total of 24,693 persons under out-of-state supervision. Brief for Petitioner 21–22.

Some amount of disruption inevitably attends any new constitutional ruling. We are confident, however, that modification of the

III

The second, and more difficult, question posed by this case is whether an indigent probationer or parolee has a due process right to be represented by appointed counsel at these hearings.[6] In answering that question, we draw heavily on the opinion in *Morrissey*. Our first point of reference is the character of probation or parole. As noted in *Morrissey* regarding parole, the "purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able . . . ." 408 U. S., at 477. The duty and attitude of the probation or parole officer reflect this purpose:

> "While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional at-

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interstate compact can remove without undue strain the more serious technical hurdles to compliance with *Morrissey*. An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

[6] In *Morrissey* v. *Brewer,* we left open the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent." 408 U. S., at 489. Since respondent did not attempt to retain counsel but asked only for appointed counsel, we have no occasion to decide in this case whether a probationer or parolee has a right to be represented at a revocation hearing by retained counsel in situations other than those where the State would be obliged to furnish counsel for an indigent.

> titude. The parole agent ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety." [7]

Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation.

In *Morrissey,* we recognized that the revocation decision has two analytically distinct components:

> "The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" 408 U. S., at 479–480.[8]

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[7] F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, Criminal Justice Administration, Materials and Cases 910–911 (1969).

[8] The factors entering into these decisions relate in major part to a professional evaluation, by trained probation or parole officers, as to the overall social readjustment of the offender in the community, and include consideration of such variables as the offender's relationship toward his family, his attitude toward the fulfillment of financial obligations, the extent of his cooperation with the probation or parole officer assigned to his case, his personal associations, and—of course—whether there have been specific and significant violations of the conditions of the probation or parole. The importance of these considerations, some factual and others entirely judgmental, is illustrated by a Wisconsin empirical study which disclosed that, in the sample studied, probation or parole was revoked in only 34.5% of the cases in which the probationer or parolee violated the terms of his release. S. Hunt, The Revocation Decision: A Study of Probation

The parole officer's attitude toward these decisions reflects the rehabilitative rather than punitive focus of the probation/parole system:

> "Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail."[9]

But an exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised.

When the officer's view of the probationer's or parolee's conduct differs in this fundamental way from the latter's own view, due process requires that the difference be resolved before revocation becomes final. Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion—the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

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and Parole Agents' Discretion 10 (unpublished thesis on file at the library of the University of Wisconsin) (1964), cited in Brief for Petitioner, Addendum 106.

[9] Remington, Newman, Kimball, Melli & Goldstein, *supra,* n. 7, at 910.

It was to serve all of these interests that *Morrissey* mandated preliminary and final revocation hearings. At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. 408 U. S., at 487. The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements:

> "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole." *Morrissey* v. *Brewer, supra,* at 489.

These requirements in themselves serve as substantial protection against ill-considered revocation, and petitioner argues that counsel need never be supplied. What this argument overlooks is that the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

By the same token, we think that the Court of Appeals erred in accepting respondent's contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases. While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel. In most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him.[10] And while in some cases he may have a justifiable excuse for the violation or a convincing reason why revocation is not the appropriate disposition, mitigating evidence of this kind is often not susceptible of proof or is so simple as not to require either investigation or exposition by counsel.

The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being "predictive and discretionary" as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.[11]

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[10] See Sklar, *supra,* n. 3, at 192 (parole), 193 (probation).

In some cases, these modifications in the nature of the revocation hearing must be endured and the costs borne because, as we have indicated above, the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate. But due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.

In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in *Betts* v. *Brady,* 316 U. S. 455 (1942), was later rejected in favor of a *per se* rule in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). See also *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972). We do not, however, draw from *Gideon* and *Argersinger* the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings: there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences.

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[11] The scope of the practical problem which would be occasioned by a requirement of counsel in all revocation cases is suggested by the fact that in the mid-1960's there was an estimated average of 20,000 adult felony parole revocations and 108,000 adult probation revocations each year. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 56 n. 28 (1967).

In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases.

The differences between a criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer. Without denying that there is some force in this argument, we think it a sufficient answer that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.[12]

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[12] Cf. *In re Gault*, 387 U. S. 1 (1967), establishing a juvenile's right to appointed counsel in a delinquency proceeding which, while denominated civil, was functionally akin to a criminal trial. A juvenile charged with violation of a generally applicable statute is differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection. See *In re Winship*,

We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.

It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider,

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397 U. S. 358 (1970) (the standard of proof in a juvenile delinquency proceeding must be "proof beyond a reasonable doubt").

especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

IV

We return to the facts of the present case. Because respondent was not afforded either a preliminary hearing or a final hearing, the revocation of his probation did not meet the standards of due process prescribed in *Morrissey,* which we have here held applicable to probation revocations. Accordingly, respondent was entitled to a writ of habeas corpus. On remand, the District Court should allow the State an opportunity to conduct such a hearing. As to whether the State must provide counsel, respondent's admission to having committed another serious crime creates the very sort of situation in which counsel need not ordinarily be provided. But because of respondent's subsequent assertions regarding that admission, see *supra,* at 780, we conclude that the failure of the Department to provide respondent with the assistance of counsel should be re-examined in light of this opinion. The general guidelines outlined above should be applied in the first instance by those charged with conducting the revocation hearing.

Affirmed in part, reversed in part, and remanded.

MR. JUSTICE DOUGLAS, dissenting in part.

I believe that due process requires the appointment of counsel in this case because of the claim that respondent's confession of the burglary was made under duress. See *Morrissey* v. *Brewer,* 408 U. S. 471, 498 (opinion of DOUGLAS, J.).

McDONNELL DOUGLAS CORP. *v.* GREEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 72-490. Argued March 28, 1973—Decided May 14, 1973

Respondent, a black civil rights activist, engaged in disruptive and illegal activity against petitioner as part of his protest that his discharge as an employee of petitioner's and the firm's general hiring practices were racially motivated. When petitioner, who subsequently advertised for qualified personnel, rejected respondent's re-employment application on the ground of the illegal conduct, respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging violation of Title VII of the Civil Rights Act of 1964. The EEOC found that there was reasonable cause to believe that petitioner's rejection of respondent violated § 704 (a) of the Act, which forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory employment conditions, but made no finding on respondent's allegation that petitioner had also violated § 703 (a)(1), which prohibits discrimination in any employment decision. Following unsuccessful EEOC conciliation efforts, respondent brought suit in the District Court, which ruled that respondent's illegal activity was not protected by § 704 (a) and dismissed the § 703 (a)(1) claim because the EEOC had made no finding with respect thereto. The Court of Appeals affirmed the § 704 (a) ruling, but reversed with respect to § 703 (a)(1), holding that an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court. *Held:*

1. A complainant's right to bring suit under the Civil Rights Act of 1964 is not confined to charges as to which the EEOC has made a reasonable-cause finding, and the District Court's error in holding to the contrary was not harmless since the issues raised with respect to § 703 (a)(1) were not identical to those with respect to § 704 (a) and the dismissal of the former charge may have prejudiced respondent's efforts at trial. Pp. 798-800.

2. In a private, non-class-action complaint under Title VII charging racial employment discrimination, the complainant has the burden of establishing a prima facie case, which he can satisfy by showing that (i) he belongs to a racial minority; (ii) he

applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications. P. 802.

3. Here, the Court of Appeals, though correctly holding that respondent proved a prima facie case, erred in holding that petitioner had not discharged its burden of proof in rebuttal by showing that its stated reason for the rehiring refusal was based on respondent's illegal activity. But on remand respondent must be afforded a fair opportunity of proving that petitioner's stated reason was just a pretext for a racially discriminatory decision, such as by showing that whites engaging in similar illegal activity were retained or hired by petitioner. Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner had discriminated against respondent when he was an employee or followed a discriminatory policy toward minority employees. Pp. 802–805.

463 F. 2d 337, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Veryl L. Riddle argued the cause for petitioner. With him on the briefs were *R. H. McRoberts* and *Thomas C. Walsh.*

Louis Gilden argued the cause for respondent. With him on the brief were *Jack Greenberg, James M. Nabrit III, William L. Robinson,* and *Albert Rosenthal.*[*]

MR. JUSTICE POWELL delivered the opinion of the Court.

The case before us raises significant questions as to the proper order and nature of proof in actions under Title

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[*] *Milton A. Smith* and *Lawrence M. Cohen* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Solicitor General Griswold, Assistant Attorney General Pottinger, Deputy Solicitor General Wallace, Keith A. Jones, David L. Rose, Julia P. Cooper, and *Beatrice Rosenberg* filed a brief for the United States as *amicus curiae* urging affirmance.

VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*

Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964[1] when he was laid off in the course of a general reduction in petitioner's work force.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated.[2] As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the "stall-in" as follows:

> "[F]ive teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

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[1] His employment during these years was continuous except for 21 months of service in the military.

[2] The Court of Appeals noted that respondent then "filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights." 463 F. 2d 337, 339 (1972).

> "Acting under the 'stall in' plan, plaintiff [respondent in the present action] drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a. m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined." 318 F. Supp. 846, 849.

On July 2, 1965, a "lock-in" took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants, certain of petitioner's employees, from leaving. Though respondent apparently knew beforehand of the "lock-in," the full extent of his involvement remains uncertain.[3]

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[3] The "lock-in" occurred during a picketing demonstration by ACTION, a civil rights organization, at the entrance to a downtown office building which housed a part of petitioner's offices and in which certain of petitioner's employees were working at the time. A chain and padlock were placed on the front door of the building to prevent ingress and egress. Although respondent acknowledges that he was chairman of ACTION at the time, that the demonstration was planned and staged by his group, that he participated in and indeed was in charge of the picket line in front of the building, that he was told in advance by a member of ACTION "that he was planning to chain the front door," and that he "approved of" chaining the door, there is no evidence that respondent personally took part in the actual "lock-in," and he was not arrested. App. 132–133.

The Court of Appeals majority, however, found that the record did "not support the trial court's conclusion that Green 'actively cooperated' in chaining the doors of the downtown St. Louis building during the 'lock-in' demonstration." 463 F. 2d, at 341. See also concurring opinion of Judge Lay. *Id.*, at 345. Judge Johnsen, in

Some three weeks following the "lock-in," on July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the "stall-in" and "lock-in." Shortly thereafter, respondent filed a formal complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703 (a)(1) and 704 (a) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e-2 (a)(1) and 2000e-3 (a).[4] The former section generally prohibits racial discrimination in any employment decision while the latter forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

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dissent, agreed with the District Court that the "chaining and padlocking [were] carried out as planned, [and that] Green had in fact given it . . . approval and authorization." *Id.*, at 348.

In view of respondent's admitted participation in the unlawful "stall-in," we find it unnecessary to resolve the contradictory contentions surrounding this "lock-in."

[4] Section 703 (a)(1) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (a)(1), in pertinent part provides:

"It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

Section 704 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-3 (a), in pertinent part provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ."

The Commission made no finding on respondent's allegation of racial bias under § 703 (a)(1), but it did find reasonable cause to believe petitioner had violated § 704 (a) by refusing to rehire respondent because of his civil rights activity. After the Commission unsuccessfully attempted to conciliate the dispute, it advised respondent in March 1968, of his right to institute a civil action in federal court within 30 days.

On April 15, 1968, respondent brought the present action, claiming initially a violation of § 704 (a) and, in an amended complaint, a violation of § 703 (a)(1) as well.[5] The District Court dismissed the latter claim of racial discrimination in petitioner's hiring procedures on the ground that the Commission had failed to make a determination of reasonable cause to believe that a violation of that section had been committed. The District Court also found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or § 704 protected "such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations." 318 F. Supp., at 850.

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under § 704 (a),[6] but reversed the dismissal of respondent's § 703 (a)(1) claim relating to racially discriminatory hiring practices, holding that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite to raising a claim under that section in federal court. The court ordered the case remanded for trial of respondent's claim under § 703 (a)(1).

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[5] Respondent also contested the legality of his 1964 discharge by petitioner, but both courts held this claim barred by the statute of limitations. Respondent does not challenge those rulings here.

[6] Respondent has not sought review of this issue.

In remanding, the Court of Appeals attempted to set forth standards to govern the consideration of respondent's claim. The majority noted that respondent had established a prima facie case of racial discrimination; that petitioner's refusal to rehire respondent rested on "subjective" criteria which carried little weight in rebutting charges of discrimination; that, though respondent's participation in the unlawful demonstrations might indicate a lack of a responsible attitude toward performing work for that employer, respondent should be given the opportunity to demonstrate that petitioner's reasons for refusing to rehire him were mere pretext.[7] In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari, 409 U. S. 1036 (1972).

I

We agree with the Court of Appeals that absence of a Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII and that the District Judge erred in dismissing respondent's claim of racial discrimination under § 703 (a)(1). Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U. S. C. §§ 2000e-5 (a) and 2000e-5 (e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. The Commission itself does not consider the absence of a "reasonable cause" determination as providing employer immunity from similar charges in a federal court, 29 CFR § 1601.30, and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings, "court actions under Title VII are de novo proceedings and . . . a Commission 'no reasonable cause' finding does not bar a lawsuit in the case." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 800 (CA4 1971); *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F. 2d 1136 (CA5 1971); *Flowers* v. *Local 6, Laborers International Union of North America,* 431 F. 2d 205 (CA7 1970); *Fekete* v. *U. S. Steel Corp.*, 424 F. 2d 331 (CA3 1970).

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[7] All references here are to Part V of the revised opinion of the Court of Appeals, 463 F. 2d, at 352, which superseded Part V of the court's initial opinion with respect to the order and nature of proof.

Petitioner argues, as it did below, that respondent sustained no prejudice from the trial court's erroneous ruling because in fact the issue of racial discrimination in the refusal to re-employ "was tried thoroughly" in a trial lasting four days with "at least 80%" of the questions relating to the issue of "race."[8] Petitioner, therefore, requests that the judgment below be vacated and the cause remanded with instructions that the judgment of the District Court be affirmed.[9] We cannot agree that the dismissal of respondent's § 703 (a)(1) claim was harmless error. It is not clear that the District Court's findings as to respondent's § 704 (a) contentions involved the identical issues raised by his claim under § 703 (a)(1). The former section relates solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests, while the latter section deals with the broader and centrally important question under the Act of whether, for any reason, a racially discriminatory employment decision has been made. Moreover, respondent should have been accorded the right to prepare his case and plan the strategy of trial with the knowledge that the § 703 (a)(1) cause of action was properly before the District Court.[10] Accordingly, we remand the case for trial of respondent's claim of racial discrimination consistent with the views set forth below.

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[8] Tr. of Oral Arg. 11.

[9] Brief for Petitioner 40.

II

The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 429 (1971); *Castro* v. *Beecher,* 459 F. 2d 725 (CA1 1972); *Chance* v. *Board of Examiners,* 458 F. 2d 1167 (CA2 1972); *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505 (ED Va. 1968). As noted in *Griggs, supra:*

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

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[10] The trial court did not discuss respondent's § 703 (a)(1) claim in its opinion and denied requests for discovery of statistical materials which may have been relevant to that claim.

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, at 430–431.

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

In this case respondent, the complainant below, charges that he was denied employment "because of his involvement in civil rights activities" and "because of his race and color."[11] Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.[12] We now address this problem.

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[11] The respondent initially charged petitioner in his complaint filed April 15, 1968, with discrimination because of his "involvement in civil rights activities." App. 8. In his amended complaint, filed March 20, 1969, plaintiff broadened his charge to include denial of employment because of race in violation of § 703 (a)(1). App. 27.

[12] See original opinion of the majority of the panel which heard the case, 463 F. 2d, at 338; the concurring opinion of Judge Lay, *id.*, at 344; the first opinion of Judge Johnsen, dissenting in part, *id.*, at 346;

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13] In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case. 463 F. 2d 337, 353. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications[14] and acknowledges that his past work performance in petitioner's employ was "satisfactory."[15]

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be

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the revised opinion of the majority, *id.*, at 352; and the supplemental dissent of Judge Johnsen, *id.*, at 353. A petition for rehearing en banc was denied by an evenly divided Court of Appeals.

[13] The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

[14] We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be "shown to bear a demonstrable relationship to successful performance of the jobs" for which they were used, *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). *Castro* v. *Beecher*, 459 F. 2d 725 (CA1 1972); *Chance* v. *Board of Examiners*, 458 F. 2d 1167 (CA2 1972).

[15] Tr. of Oral Arg. 3; 463 F. 2d, at 353.

recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carr[ies] little weight in rebutting charges of discrimination," 463 F. 2d, at 352. This was among the statements which caused the dissenting judge to read the opinion as taking "the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved . . . ." *Id.*, at 355. Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned "stall-in," designed to tie up access to and egress from petitioner's plant at a peak traffic hour.[16] Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.[17] In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained an employer's factory buildings in an illegal sit-down strike, the Court noted pertinently:

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[16] The trial judge noted that no personal injury or property damage resulted from the "stall-in" due "solely to the fact that law enforcement officials had obtained notice in advance of plaintiff's [here respondent's] demonstration and were at the scene to remove plaintiff's car from the highway." 318 F. Supp. 846, 851.

[17] The unlawful activity in this case was directed specifically against petitioner. We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire.

> "We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property . . . . Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression." *NLRB* v. *Fansteel Corp.*, 306 U. S. 240, 255 (1939).

Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703 (a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment.[18] On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (CA10 1970); Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.*, and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 91–94 (1972).[19] In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

The court below appeared to rely upon *Griggs* v. *Duke Power Co., supra,* in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U. S., at 431.[20] But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. *Id.*, at 430. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove. *Id.*, at 431.[21]

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[18] We are aware that some of the above factors were, indeed, considered by the District Judge in finding under § 704 (a), that "defendant's [here petitioner's] reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the 'stall in' and 'lock in' demonstrations." 318 F. Supp., at 850. We do not intimate that this finding must be overturned after consideration on remand of respondent's § 703 (a)(1) claim. We do, however, insist that respondent under § 703 (a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.

[19] The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." See Blumrosen, *supra,* at 92. We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire. See generally *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977, 992 (WDNY 1970), order modified, 446 F. 2d 652 (CA2 1971). Blumrosen, *supra,* n. 19, at 93.

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[20] See 463 F. 2d, at 352.

[21] It is, of course, a predictive evaluation, resistant to empirical proof, whether "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." 463 F. 2d, at 353. But in this case, given the seriousness and harmful potential of respondent's participation in the "stall-in" and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification. As the Court has noted elsewhere: "Past conduct may well relate to present fitness; past loyalty may

III

In sum, respondent should have been allowed to pursue his claim under § 703 (a)(1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

The judgment is vacated and the cause is hereby remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

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have a reasonable relationship to present and future trust." *Garner* v. *Los Angeles Board,* 341 U. S. 716, 720 (1951).

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 807 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM MARCH 23 THROUGH MAY 14, 1973

March 23, 1973

Miscellaneous Orders

No. A–968 (72–1290). Bufalino *v.* Immigration and Naturalization Service. C. A. 3d Cir. Application for stay of deportation presented to Mr. Justice Brennan, and by him referred to the Court, denied. Mr. Justice Marshall took no part in the consideration or decision of this application. Reported below: 473 F. 2d 728.

No. A–969. Baker et al. *v.* New York. C. A. 2d Cir. Application for stay presented to Mr. Justice Marshall, and by him referred to the Court, denied.

March 26, 1973

Dismissal Under Rule 60

No. 72–1236. Ponder *v.* Louisiana State Bar Assn. Sup. Ct. La. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

Affirmed on Appeal

No. 72–1070. Binkowski *v.* Miller et al. Affirmed on appeal from D. C. E. D. Mich.

Appeal Dismissed

No. 72–1082. Benners, Executrix *v.* City of University Park. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 485 S. W. 2d 773.

Certiorari Granted—Vacated and Remanded. (See also No. 72-864, *ante*, p. 138.)

No. 71-6693. REED ET AL. *v.* CITY OF NEW ORLEANS. Sup. Ct. La. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for reconsideration in light of *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972). MR. JUSTICE DOUGLAS would grant certiorari and reverse the judgment.

No. 72-5484. GEORGE *v.* LOUISIANA. Sup. Ct. La. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Stewart* v. *Massachusetts*, 408 U. S. 845 (1972). Reported below: 262 La. 409, 263 So. 2d 339.

Miscellaneous Orders

No. A-920 (72-1004). BETHLEHEM STEEL CORP. *v.* WILLIAMSON ET AL. Application to vacate stay heretofore granted by the United States Court of Appeals for the Second Circuit presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted. Reported below: 468 F. 2d 1201.

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. It is hereby ordered that John F. Davis, the Special Master appointed in this cause, having completed his duties, is hereby discharged.

It is further ordered that his expenditures in preparing the supplemental report in amount of One Hundred Four Dollars ($104) are approved.

It is further ordered that the compensation for services of the Special Master in the supplementary proceedings be fixed at One Thousand Dollars ($1,000) and that that amount plus the approved expenditures shall be paid to him by Western Union out of the funds in its possession which are the subject of this suit and that Western Union be given credit for that amount divided pro rata among the parties who would otherwise be entitled to the money under the opinion and decree of this Court. [For earlier orders herein, see, *e. g.*, 410 U. S. 977.]

No. 71–6278. ALMEIDA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 406 U. S. 944.] Motion of Prison Research Council for the University of Pennsylvania for leave to file an untimely brief as *amicus curiae* denied. Motion for appointment of counsel granted. It is ordered that John J. Cleary, Esquire, of San Diego, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as co-counsel for petitioner in this case.

No. 71–6732. CHAFFIN *v.* STYNCHCOMBE, SHERIFF. C. A. 5th Cir. [Certiorari granted, 409 U. S. 912.] Motion of the Attorney General of Tennessee for leave to file a brief as *amicus curiae* after argument granted.

No. 72–394. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* HYNSON, WESTCOTT & DUNNING, INC.;

No. 72–414. HYNSON, WESTCOTT & DUNNING, INC. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.;

No. 72–555. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* BENTEX PHARMACEUTICALS, INC., ET AL.;

No. 72–666. USV PHARMACEUTICAL CORP. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 4th Cir.; and

No. 72–528. CIBA CORP. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 3d Cir. [Certiorari granted, 409 U. S. 1105.] Motion of Bentex Pharmaceuticals, Inc., et al., for additional time for oral argument denied.

No. 72-624. UNITED STATES *v.* PENNSYLVANIA INDUSTRIAL CHEMICAL CORP. C. A. 3d Cir. [Certiorari granted, 409 U. S. 1074]. Motions of Jones & Laughlin Steel Corp. and Chamber of Commerce of the United States for leave to participate in oral argument as *amici curiae* denied.

No. 72-658. CITY OF KENOSHA ET AL. *v.* BRUNO ET AL. Appeal from D. C. E. D. Wis. [Probable jurisdiction noted, 409 U. S. 1105.] Motion to dispense with filing a brief on the merits on behalf of appellees Richard Misurelli and David Robers granted.

No. 72-694. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 410 U. S. 907.] Motion of National Education Assn. et al. for leave to file an untimely brief as *amici curiae* granted.

No. 72-822. RENEGOTIATION BOARD *v.* BANNERCRAFT CLOTHING CO., INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 410 U. S. 907.] Motion of Sears, Roebuck & Co. for leave to file a brief as *amicus curiae* granted, and motion for leave to postpone oral argument denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 72-950. REED *v.* REED, 410 U. S. 931. Motion of respondent for reasonable damages under Rule 56 (4) of the Rules of this Court denied.

No. 72-1061. WINDWARD SHIPPING (LONDON) LTD. ET AL. *v.* AMERICAN RADIO ASSN., AFL-CIO, ET AL. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 482 S. W. 2d 675.

No. 72-5521. Strunk, aka Wagner *v.* United States C. A. 7th Cir. [Certiorari granted, 409 U. S. 1106.] Motion of Terence F. MacCarthy to permit John R. Wideikis to argue *pro hac vice* on behalf of petitioner granted.

No. 72-6170. Kaplan *v.* Judges of the United States Court of Appeals for the Second Circuit et al. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 72-5830. Patterson *v.* Warner et al. Appeal from D. C. S. D. W. Va. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

Certiorari Granted

No. 72-1057. United States *v.* Giordano et al. C. A. 4th Cir. Motion of respondent Giordano for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 469 F. 2d 522.

Certiorari Denied

No. 72-944. Marulakis *v.* Williams. Sup. Ct. Ohio. Certiorari denied.

No. 72-975. Newman *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 791.

No. 72-980. Vastola *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 72-982. Rosenberg *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 72-988. Moore *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 469 F. 2d 788.

No. 72-991. MILLER, AKA MULLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72-1009. FLOOD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 904.

No. 72-1015. TRED-AIR OF CALIFORNIA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied.

No. 72-1029. DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA *v.* R & M KAUFMANN, A DIVISION OF RUSS TOGS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 301.

No. 72-1045. BIBLE BAPTIST CHURCH *v.* IRELAND ET AL. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 480 S. W. 2d 467.

No. 72-1060. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72-1081. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS *v.* WASHINGTON TERMINAL CO. C. A. D. C. Cir. Certiorari denied. Reported below: 154 U. S. App. D. C. 119, 473 F. 2d 1156.

No. 72-1083. O'BRIEN *v.* FRANICH ET AL. Ct. App. Wash. Certiorari denied. Reported below: 7 Wash. App. 107, 499 P. 2d 24.

No. 72-1089. LONDON *v.* PATTERSON, VOCATIONAL INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 2d 95.

No. 72-1122. JACKSONVILLE NEWSPAPER PRINTING PRESSMAN & ASSISTANTS' UNION NO. 57 *v.* FLORIDA PUBLISHING CO. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 824.

No. 72-5706. Hughes *v.* Cardwell, Warden. C. A. 6th Cir. Certiorari denied.

No. 72-5801. Strader *v.* North Carolina. C. A. 4th Cir. Certiorari denied.

No. 72-5833. Lombardi *v.* Warner, Justice. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 72-5859. Hall *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 15 Md. App. 363, 290 A. 2d 803.

No. 72-5860. Murray *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 266 So. 2d 139.

No. 72-5892. Gore *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 6 Ill. App. 3d 51, 284 N. E. 2d 333.

No. 72-5897. Brown *v.* Cardwell, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 654.

No. 72-5903. Dixon *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72-5947. Ellingburg *v.* Arkansas. C. A. 8th Cir. Certiorari denied.

No. 72-5971. Stephenson *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 296 A. 2d 606.

No. 72-6007. Liantaud *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 2d 1342.

No. 72-6016. Soto *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 72-6017. Cantu *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 679.

No. 72-6021. Crews et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 331.

No. 72-6028. Gammon *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 72-6030. Robinson *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 72-6031. Kubitsky *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 469 F. 2d 1253.

No. 72-6036. Riggs *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 470 F. 2d 505.

No. 72-6037. Smith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 952.

No. 72-6045. Crowder *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 464 F. 2d 1284.

No. 72-6053. Morris *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 72-6091. Lee *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 289 Ala. 597, 269 So. 2d 184.

No. 72-6164. Wardlaw *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 286 N. E. 2d 649.

No. 72-6169. Rulo *v.* Rubin, Trustee in Bankruptcy. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 2d 826.

No. 72–6071. George *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 952.

No. 72–6172. Cherry *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 488 S. W. 2d 744.

No. 72–6180. Shadden *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 488 S. W. 2d 54.

No. 72–6193. Graham *v.* Hall. C. A. 6th Cir. Certiorari denied.

No. 72–6196. Martin *v.* Wainwright, Corrections Director, et al. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1072.

No. 72–6212. Robinson *v.* Alabama. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 690.

No. 72–6223. Jackson *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 32 Ohio St. 2d 203, 291 N. E. 2d 432.

No. 72–974. Popkin *v.* United States. C. A. 1st Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: See 460 F. 2d 328.

No. 72–5835. Martin *v.* Florida. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 464 F. 2d 1394.

No. 72–5966. Heinrich *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 470 F. 2d 238.

No. 72–977. Jack *v.* United States; and

No. 72–978. Overton *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of these petitions. Reported below: 470 F. 2d 761.

No. 72-5973. HALVERSON *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72-1001. MAJEWSKI *v.* UNITED STATES. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72-1116. McCLOUD *v.* BRANCH ET AL. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72-5632. WORTON *v.* OKLAHOMA. C. A. 10th Cir. Motion to amend petition granted. Certiorari denied.

Rehearing Denied

No. 71-685. LEHNHAUSEN, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS *v.* LAKE SHORE AUTO PARTS CO. ET AL., 410 U. S. 356;

No. 71-691. BARRETT, COUNTY CLERK OF COOK COUNTY, ILLINOIS, ET AL. *v.* SHAPIRO ET AL., 410 U. S. 356;

No. 71-1672. GUTHRIE ET AL. *v.* ALABAMA BY-PRODUCTS CO. ET AL., 410 U. S. 946;

No. 72-839. WILLIAMS *v.* MISSISSIPPI EXPORT RAILROAD, 410 U. S. 942; and

No. 72-963. HUTTER ET AL. *v.* COOK COUNTY, ILLINOIS, ET AL., 410 U. S. 955. Petitions for rehearing denied.

No. 71-991. OTTER TAIL POWER CO. *v.* UNITED STATES, 410 U. S. 366. Petition for rehearing denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 72-510. FALKNER ET UX. *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS, 410 U. S. 923. Motion to dispense with printing petition granted. Petition for rehearing denied.

April 2, 1973

Affirmed on Appeal

No. 72-997. Atlee et al. *v.* Richardson, Secretary of Defense, et al. Affirmed on appeal from D. C. E. D. Pa. Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Stewart would note probable jurisdiction and set case for oral argument. Reported below: 347 F. Supp. 689.

No. 72-6025. Briggs et al. *v.* Arafeh, Hospital Superintendent, et al. Affirmed on appeal from D. C. Conn. Mr. Justice Douglas and Mr. Justice Powell dissent from affirmance. Reported below: 346 F. Supp. 1265.

Appeals Dismissed

No. 72-795. Leathers *v.* Massell et al. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 229 Ga. 503, 192 S. E. 2d 379.

No. 72-893. Fox et ux. *v.* Norberg, Tax Administrator. Appeal from Super. Ct. R. I. dismissed for want of substantial federal question. Reported below: See 110 R. I. 418, 293 A. 2d 520.

No. 72-1093. Variety Theatres, Inc. *v.* Cleveland County et al. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 282 N. C. 272, 192 S. E. 2d 290.

No. 72-5919. Faubion *v.* Juras, Administrator, Oregon Public Welfare Division, et al. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Mr. Justice Douglas dissents for reasons stated in his dissenting opinion in *Ortwein* v. *Schwab,* 410 U. S. 656, 661 (1973).

No. 72-1106. HAMMOND *v.* HAGER ET AL. Appeal from Sup. Ct. Mont. dismissed for want of substantial federal question. Reported below: 160 Mont. 391, 503 P. 2d 52.

No. 72-1114. HUTTER ET UX. *v.* KORZEN. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 5 Ill. App. 3d 694, 293 N. E. 2d 905.

No. 72-5943. BOYKIN ET AL. *v.* OTT, ADMINISTRATOR, OREGON MOTOR VEHICLES DIVISION. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 10 Ore. App. 210, 498 P. 2d 815.

Certiorari Granted—Vacated and Remanded

No. 72-1075. BACHRODT CHEVROLET CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded with instructions to remand case to the National Labor Relations Board for such further proceedings as may be appropriate in light of *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272 (1972). *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87-88 (1943). Reported below: 468 F. 2d 963.

Miscellaneous Orders

No. A-987. RUDERER *v.* BARTLETT, U. S. ATTORNEY. C. A. 8th Cir. Motion for leave to file petition for injunctive order, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 72-658. CITY OF KENOSHA ET AL. *v.* BRUNO ET AL. Appeal from D. C. E. D. Wis. [Probable jurisdiction noted, 409 U. S. 1105.] Motion to permit two counsel to argue orally on behalf of appellees granted.

No. 48, Orig. Mississippi *v.* Arkansas. Report of Special Master received and ordered filed. Exceptions to Report, if any, with supporting briefs may be filed by the parties on or before May 17, 1973. Reply briefs, if any, to such exceptions may be filed on or before June 18, 1973. [For earlier orders herein, see, *e. g.*, 403 U. S. 951.]

No. 72-459. Sloan, Treasurer of Pennsylvania, et al. *v.* Lemon et al.; and

No. 72-620. Crouter *v.* Lemon et al. Appeals from D. C. E. D. Pa. [Probable jurisdiction noted, 410 U. S. 907.] Motion of National Association of Independent Schools, Inc., for leave to participate in oral argument as *amicus curiae* denied.

No. 72-549. School Board of City of Richmond, Virginia, et al. *v.* State Board of Education of Virginia et al.; and

No. 72-550. Bradley et al. *v.* State Board of Education of Virginia et al. C. A. 4th Cir. [Certiorari granted, 409 U. S. 1124.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of respondents granted and 15 minutes allotted for that purpose. Counsel for petitioners hereby allotted 15 additional minutes for oral argument. Mr. Justice Powell took no part in the consideration or decision of this motion.

No. 72-5990. Maghe *v.* Guarino, Judge;

No. 72-6113. Johnson *v.* Stuart, U. S. District Judge, et al.;

No. 72-6186. Gerardi *v.* Seamans, Secretary of the Air Force;

No. 72-6187. Gerardi *v.* Johnson, Administrator of Veterans Affairs; and

No. 72-6188. Gerardi *v.* United States Department of Justice. Motions for leave to file petitions for writs of mandamus denied.

No. 72-694. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.;

No. 72-753. ANDERSON *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.;

No. 72-791. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.; and

No. 72-929. CHERRY ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, 410 U. S. 907.] Motion of Lawrence E. Klinger for leave to file an untimely brief as *amicus curiae* granted.

No. 72-804. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. [Certiorari granted, 409 U. S. 1124.] Motion of the State of Arizona et al. for leave to present oral argument as *amici curiae* denied.

No. 72-1187. COMBS, SUPERINTENDENT, GRAND PRAIRIE INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* JOHNSON ET AL. C. A. 5th Cir. Motion to advance and for pendente lite relief denied. Reported below: 471 F. 2d 84.

No. 72-5881. MARSHALL *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 410 U. S. 954.] Motion for appointment of counsel granted. It is ordered that James F. Hewitt, Esquire, of San Francisco, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 72-1084. GROSSMAN *v.* KAVANAGH, CHIEF JUSTICE, SUPREME COURT OF MICHIGAN. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 71–1631. Kusper et al. *v.* Pontikes. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. Reported below: 345 F. Supp. 1104.

No. 72–922. Paschall et al. *v.* Christie-Stewart, Inc., et al. Appeal from Sup. Ct. Okla. Probable jurisdiction noted. Reported below: 502 P. 2d 1265.

No. 72–1118. Phillips, Acting Director, Office of Economic Opportunity, et al. *v.* Kennedy et al. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. Reported below: 349 F. Supp. 863.

Certiorari Granted

No. 72–953. O'Shea, Magistrate, Circuit Court of Alexander County, Illinois, et al. *v.* Littleton et al. C. A. 7th Cir. Certiorari granted and case set for oral argument with No. 72–955 [immediately *infra*]. Reported below: 468 F. 2d 389.

No. 72–955. Spomer, State's Attorney of Alexander County, Illinois *v.* Littleton et al. C. A. 7th Cir. Certiorari granted and case set for oral argument with No. 72–953 [immediately *supra*]. Reported below: 468 F. 2d 389.

No. 72–6041. Pernell *v.* Southall Realty. Ct. App. D. C. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 294 A. 2d 490.

Certiorari Denied

No. 72–819. Reyes *v.* Laborers' International Union of North America, Local Union No. 16, et al. C. A. 10th Cir. Certiorari denied. Reported below: 464 F. 2d 595.

No. 72-842. BRADLEY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 265 So. 2d 532.

No. 72-898. FIOCCONI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72-924. LAFAYETTE AIRPORT COMMISSION ET AL. *v.* ROY ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 265 So. 2d 459.

No. 72-927. BANKERS LIFE & CASUALTY CO. *v.* VILLAGE OF NORTH PALM BEACH, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 994.

No. 72-979. THORNE *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 72-1011. COOPER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72-1014. BRADEN *v.* HERMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 2d 592.

No. 72-1016. CHIP STEAK CO., INC., ET AL. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 481.

No. 72-1017. NEBRASKA ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.; and

No. 72-1020. NEBRASKA ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 8th Cir. Certiorari denied.

No. 72-1074. MARTIN *v.* MARTIN. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 261 So. 2d 179.

No. 72-1080. PELTZMAN *v.* AMERICAN RADIO ASSN. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 72–1087. Card *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 144.

No. 72–1088. Pennsylvania *v.* Brown. Sup. Ct. Pa. Certiorari denied.

No. 72–1110. Usciak *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 222 Pa. Super. 235, 294 A. 2d 765.

No. 72–1121. Ellis et al. *v.* Flying Tiger Corp. C. A. 7th Cir. Certiorari denied.

No. 72–1132. Jacobs, Administratrix *v.* Clarke-White. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 72–1143. Spercel, dba Spercel Tool Co. *v.* Sterling Industries, Inc., et al. Sup. Ct. Ohio. Certiorari denied. Reported below: 31 Ohio St. 2d 36, 285 N. E. 2d 324.

No. 72–1227. Morton, Secretary of the Interior *v.* Wilderness Society et al.;

No. 72–1228. Alaska *v.* Wilderness Society et al.; and

No. 72–1229. Alyeska Pipeline Service Co. *v.* Wilderness Society et al. C. A. D. C. Cir. Certiorari denied. Reported below: 156 U. S. App. D. C. 121, 479 F. 2d 842.

No. 72–5406. Carter *v.* Hardy. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1136.

No. 72–5793. Long *v.* Twomey, Warden. C. A. 7th Cir. Certiorari denied.

No. 72–5813. Bilton *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 72-5887. Passwater et al. *v.* Myers, Judge, et al. C. A. 7th Cir. Certiorari denied.

No. 72-5898. Knight *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 654.

No. 72-5912. Evans *v.* Evans. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72-5928. McMurray *v.* Illinois. App. Ct. Ill., 1st Jud. Dist. Certiorari denied. Reported below: 6 Ill. App. 3d 129, 285 N. E. 2d 242.

No. 72-5968. Hargrove *v.* Slayton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 72-5969. Thomas *v.* Slayton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 72-5984. Lovallo *v.* Froehlke, Secretary of the Army, et al. C. A. 2d Cir. Certiorari denied. Reported below: 468 F. 2d 340.

No. 72-6009. Shorter *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 72-6042. Pellegrino et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 1205.

No. 72-6051. Allen *v.* Cardwell, Warden. C. A. 6th Cir. Certiorari denied.

No. 72-6052. Landry *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 72-6056. Maciel *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 718.

No. 72-6062. Valdez *v.* California Selective Service Local Board No. 44 et al. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 1087.

No. 72-6061. Evans *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 696.

No. 72-6063. Perez-Valle *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 72-6065. Crowder *v.* Harris, Warden. C. A. 10th Cir. Certiorari denied.

No. 72-6077. Alberti *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 878.

No. 72-6078. Williams *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 655.

No. 72-6085. Davenport *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 1140.

No. 72-6087. Henderson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 654.

No. 72-6088. Giardina *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 650.

No. 72-6089. Von Atzingen *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 1297.

No. 72-6105. Fields *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 72-6184. Torres et al. *v.* New York City Transit Authority et al. C. A. 2d Cir. Certiorari denied.

No. 72-6204. Le Brun *v.* Cupp, Penitentiary Superintendent. C. A. 9th Cir. Certiorari denied.

No. 72-6214. Cox *v.* Wolff, Warden. C. A. 8th Cir. Certiorari denied.

No. 72-6215. Ridgill *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 72-6217. Eckert *v.* American Arbitration Assn. C. A. 3d Cir. Certiorari denied.

No. 72-6219. Recor *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 489 S. W. 2d 64.

No. 72-6220. Eckert *v.* Pennsylvania. C. A. 3d Cir. Certiorari denied.

No. 72-6225. Johnson *v.* Illinois. C. A. 7th Cir. Certiorari denied. Reported below: 469 F. 2d 1297.

No. 72-6237. Thornton *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 657.

No. 72-6238. Knight *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 502 P. 2d 347.

No. 72-995. Jenkins *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 470 F. 2d 1061.

No. 72-1005. Sierra Club et al. *v.* Morton, Secretary of the Interior, et al. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 467 F. 2d 1048.

No. 72-1063. Unger *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 469 F. 2d 1283.

No. 72-5808. Frinks *v.* North Carolina. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 468 F. 2d 639.

No. 72-5899. WYATT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72-5951. LINDSEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 27 Cal. App. 3d 622, 103 Cal. Rptr. 755.

No. 72-5981. WASHINGTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 S. W. 2d 721.

No. 72-1094. ESTELLE, CORRECTIONS DIRECTOR *v.* SANCHEZ. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 467 F. 2d 513.

No. 72-1115. ROZELLE *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL. C. A. 10th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 471 F. 2d 29.

No. 72-1131. NEWBERRY *v.* TOWN OF FISHKILL. C. A. 3d Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72-1146. MILAM ET UX. *v.* READING & BATES OFFSHORE DRILLING CO. ET AL. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 471 F. 2d 1197.

No. 72-5831. ROTHSTEIN ET AL. *v.* WYMAN, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE would grant certiorari. Reported below: 467 F. 2d 226.

Rehearing Denied

No. 72–5431. ORTWEIN ET AL. *v.* SCHWAB ET AL., 410 U. S. 656;

No. 72–5712. HIGGINBOTHAM *v.* UNITED STATES, 410 U. S. 933;

No. 72–5779. JACKSON *v.* UNITED STATES, 410 U. S. 935;

No. 72–5803. MCCRAY *v.* UNITED STATES, 410 U. S. 936;

No. 72–5872. THOMAS ET AL. *v.* MISSISSIPPI, 410 U. S. 939; and

No. 72–5885. SELLARS *v.* ESTELLE, CORRECTIONS DIRECTOR, 410 U. S. 940. Petitions for rehearing denied.

No. 71–364. MAHAN, SECRETARY, STATE BOARD OF ELECTIONS, ET AL. *v.* HOWELL ET AL.; and

No. 71–373. CITY OF VIRGINIA BEACH *v.* HOWELL ET AL., 410 U. S. 315. Treating the petition for rehearing in No. 71–373 as a motion to modify the Court's opinion, the following order is hereby entered:

"The motion of appellant, city of Virginia Beach, to modify this Court's opinion is hereby granted. The first paragraph in Part II of the opinion is amended by adding 'a portion of' after the phrase 'Under the plan,' in the second sentence thereof, and by striking the phrase 'encompassing the cities of Norfolk and Virginia Beach' in the last sentence of the paragraph, substituting therefor the following phrase: 'encompassing the city of Norfolk and a portion of Virginia Beach.' "*

MR. JUSTICE POWELL took no part in the consideration or decision of this order.

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*[REPORTER'S NOTE: The opinion is reported as so amended in 410 U. S., at 330 and 331.]

No. 72-826. Broussard *v.* Patton et al., 410 U. S. 942. Motion of James Abourezk et al. for leave to file a brief as *amici curiae* in support of petition for rehearing granted. Petition for rehearing denied.

No. 72-5771. Jakalski *v.* United States, 410 U. S. 935. Petition for rehearing and other relief denied.

April 5, 1973

Dismissal Under Rule 60

No. 72-1284. International Brotherhood of Electrical Workers et al. *v.* Southern Pacific Transportation Co. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 474 F. 2d 696.

April 12, 1973

Dismissal Under Rule 60

No. 72-1147. Dorfman *v.* United States. C. A. 2d Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 470 F. 2d 246.

April 16, 1973

Affirmed on Appeal

No. 72-1128. Kingston et al., Justices *v.* McLaughlin, Justice, et al. Affirmed on appeal from D. C. Mass. Reported below: 359 F. Supp. 25.

Appeals Dismissed

No. 72-925. Palkes, dba Madison Iron & Metal Co. *v.* Illinois. Appeal from Sup. Ct. Ill. dismissed for want of final judgment. Reported below: 52 Ill. 2d 472, 288 N. E. 2d 469.

No. 72–1025. B. P. O. E. LODGE 2043 OF BRUNSWICK ET AL. *v.* INGRAHAM ET AL. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 297 A. 2d 607.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN concur, dissenting.

Appellants, 15 Maine lodges of the Benevolent and Protective Order of Elks, brought suit against the State Liquor Commission of Maine to enjoin it from denying them liquor licenses under § 1301–A of Tit. 17 of the Maine Rev. Stat. Ann.,[1] which reads:

> "No person, firm or corporation holding a license under the State of Maine or any of its subdivisions for the dispensing of food, liquor or for any service or being a State of Maine corporation or a corporation authorized to do business in the State shall withhold membership, its facilities or services to any person on account of race, religion or national origin, except such organizations which are oriented to a particular religion or which are ethnic in character."

The Elks require a person to be a "white citizen" to be a member.[2] The Commission denied licenses to the 15 subordinate lodges pursuant to § 55 (8) of Tit. 28

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[1] Section 1301–A was added to Tit. 17 in 1969. C. 371, Me. Laws 1969.

[2] Section 144 of the Elks Stat. Ann. (1972) provides:

"No person shall be accepted as a member of this Order unless he be a white citizen of the United States of America, of sound mind and body, of good character, not under the age of Twenty-one years, and a believer in God. No person shall be accepted as a member of this Order who is directly or indirectly a member of or in any way connected or affiliated with the Communist Party, or who believes [in] or advocates the overthrow of our Government by force."

The bylaws of the National Order apparently are incorporated in the bylaws of each subordinate lodge.

of the Maine Rev. Stat. Ann., which provides that the Commission, in issuing or renewing licenses, "shall give consideration to the character of any applicant, the location of the place of business and the manner in which it has been operated." The Commission stated that the "whites only" limitation of the Elks Constitution established "bad moral character" of the subordinate lodges. The Supreme Judicial Court, reversing a decision of the superior court which had granted appellants a permanent injunction, upheld the Commission's action. The court stated:

> "We find it unnecessary to predicate our decision on the specific basis assigned by the Commission to support its actions—i. e., that [appellants] had 'bad moral character.' We conclude, rather, that the Commission's ultimate denial of license renewals was justified under the avowed public policy of the State of Maine, as delineated in the provisions of 17 M. R. S. A. § 1301-A, and the authority afforded the Commission under that statute conjoined with the provisions of 28 M. R. S. A. § 55 (8) allowing the Commission to take into account the 'character' of the plaintiffs (*independently of 'morality' considerations*) and the 'manner' by which they have 'operated.'" 297 A. 2d 607, 610. (Emphasis added.)

In concluding that the Commission was justified in denying the licenses because the lodges had violated the State's public policy embodied in § 1301-A, the court rejected appellants' contention, *inter alia,* that the statute violates the Equal Protection Clause of the Fourteenth Amendment.

Appellants sought a stay pending appeal to this Court, and the state court denied it. A similar application to this Court, eventually referred to the Conference, was granted, 410 U. S. 903. The Court now dismisses the appeal for want of a substantial federal question. I cannot agree with this disposition.

The Maine court specifically considered appellants' claim that the exception for "organizations which are oriented to a particular religion or which are ethnic in character" violates the Equal Protection Clause because it permits some associations to have liquor licenses notwithstanding their discriminatory membership policies. The court said:

> "The fallacy of the argument is that it fails to recognize the differences between: (1) restrictive membership discriminations which are arbitrary, because without rational relationship to the fostering of the legitimate purposes for which the association has come into being, and (2) those which rationally promote such lawfully cognizable objectives. . . .
>
> ". . . Since such organizations are formed to promote lawful objectives which their members share as common interests by virtue of their religious or ethnic identities, their confining of membership to persons who bear the same religious or ethnic identity is a rational classification. It thus lacks the arbitrariness by which discrimination becomes invidious and which is outlawed by the 'equal protection of the laws' clause of the Fourteenth Amendment of the Constitution of the United States when it is the result of State action.
>
> "The exception as here recognized by the State of Maine is, therefore, consistent with the federal Fourteenth Amendment." 297 A. 2d, at 616–617.

Webster's New International Dictionary (2d ed.) tells us that "ethnic" means: "Relating to community of physical and mental traits in races, or designating groups of races of mankind discriminated on the basis of common customs and characters." The "ethnic" exception in the Act therefore would seem to allow Chinese, Japanese, Malaysian, or African groups to practice discrimination in their lodges and still get liquor licenses but not to allow "whites" the same privilege. As stated long ago in *Strauder* v. *West Virginia,* 100 U. S. 303, 308:

> "If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

We repeated the same thought in *Hernandez* v. *Texas,* 347 U. S. 475, 478, in speaking of discrimination against persons of Mexican descent:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time

> other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro."

That classifications based upon race[3] or nationality[4] are "suspect" and therefore demand close scrutiny is well established. See *San Antonio Ind. School Dist.* v. *Rodriguez, ante,* p. 1, at 104–105. (MARSHALL, J., dissenting). I do not question the State's beneficent motives in attempting to eliminate the scourge of discrimination by whites against nonwhites solely on the basis of color, but I cannot subscribe to the view that the State may legislate against this form of invidious discrimination and, at the same time, sanction and insulate another, albeit less invidious, in the State's eyes. Since the Maine statute and its application by the Supreme Judicial Court raise, in my mind, a substantial question under the Equal Protection Clause, I would note probable jurisdiction.

No. 72–6153. RUDERER *v.* UNITED STATES ARMY AVIATION MATERIEL COMMAND ET AL. Appeal from D. C. E. D. Ill. dismissed for want of jurisdiction. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal.

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[3] See, *e. g., McLaughlin* v. *Florida,* 379 U. S. 184, 191–192; *Loving* v. *Virginia,* 388 U. S. 1, 9.

[4] See *Oyama* v. *California,* 332 U. S. 633, 644–646; *Korematsu* v. *United States,* 323 U. S. 214, 216.

Certiorari Granted—Reversed and Remanded. (See No. 72-805, *ante*, p. 216.)

Miscellaneous Orders

No. A-1028. Worcester City Hospital et al. *v.* Hathaway. C. A. 1st Cir. Application for stay of mandate presented to Mr. Justice Brennan, and by him referred to the Court, denied. Reported below: 475 F. 2d 701.

No. 72-394. Weinberger, Secretary of Health, Education, and Welfare, et al. *v.* Hynson, Westcott & Dunning, Inc.;

No. 72-414. Hynson, Westcott & Dunning, Inc. *v.* Weinberger, Secretary of Health, Education, and Welfare, et al.;

No. 72-555. Weinberger, Secretary of Health, Education, and Welfare, et al. *v.* Bentex Pharmaceuticals, Inc., et al.;

No. 72-666. USV Pharmaceutical Corp. *v.* Weinberger, Secretary of Health, Education, and Welfare, et al. C. A. 4th Cir.; and

No. 72-528. Ciba Corp. *v.* Weinberger, Secretary of Health Education, and Welfare, et al. C. A. 3d Cir. [Certiorari granted, 409 U. S. 1105.] Motions of American Public Health Assn. et al., Pharmaceutical Manufacturers Assn., and Proprietary Assn. for leave to file briefs as *amici curiae* granted.

No. 72-459. Sloan, Treasurer of Pennsylvania, et al. *v.* Lemon et al.; and

No. 72-620. Crouter *v.* Lemon et al. Appeals from D. C. E. D. Pa. [Probable jurisdiction noted, 410 U. S. 907.] Motion of National Education Assn. et al. for leave to file a brief as *amici curiae* granted.

No. 72-5794. Davis *v.* Alaska. Sup. Ct. Alaska. [Certiorari granted, 410 U. S. 925.] Motion of Arthur Bembury for leave to file a brief as *amicus curiae* granted.

No. 72-804. Ruckelshaus, Administrator, Environmental Protection Agency *v.* Sierra Club et al. C. A. D. C. Cir. [Certiorari granted, 409 U. S. 1124.] Motion of the State of Michigan for additional time and for leave to present oral argument as *amicus curiae* denied. Mr. Justice Douglas, Mr. Justice Stewart, and Mr. Justice White would grant the motion.

No. 72-6033. Pedrosa *v.* Elrod, Sheriff, et al.;
No. 72-6227. Hawkins *v.* Wyoming et al.;
No. 72-6249. Muhammad *v.* United States;
No. 72-6269. Crow *v.* Arizona et al.; and
No. 72-6292. Turner *v.* McCarthy, Men's Colony Superintendent. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72-1111. Pokrandt et al. *v.* Van Dusen, U. S. Circuit Judge. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted

No. 72-5704. Christian et al. *v.* New York State Department of Labor, Division of Employment, et al. Appeal from D. C. S. D. N. Y. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 347 F. Supp. 1158.

Certiorari Granted

No. 72-1154. Foley et al. *v.* Blair & Co., Inc., et al. C. A. 2d Cir. Certiorari granted. Reported below: 471 F. 2d 178.

No. 72-1076. Huddleston *v.* United States. C. A. 9th Cir. Motion to dispense with printing petition and certiorari granted. Reported below: 472 F. 2d 592.

Certiorari Denied

No. 72-824. Board of Education of the City of Pleasant Grove *v.* Stout et al. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 1213.

No. 72-857. McKinnon *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 3d 899, 500 P. 2d 1097.

No. 72-1004. Bethlehem Steel Corp. *v.* Williamson et al.; and

No. 72-1246. United Steelworkers of America, AFL-CIO, Local Union 2601, et al. *v.* Williamson et al. C. A. 2d Cir. Certiorari denied. Reported below: 468 F. 2d 1201.

No. 72-1013. Hanna *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 72-1028. Field *v.* United States et al. C. A. 2d Cir. Certiorari denied.

No. 72-1031. Kocher et ux. *v.* United States et al. C. A. 2d Cir. Certiorari denied. Reported below: 468 F. 2d 503.

No. 72-1032. Lachmann *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 469 F. 2d 1043.

No. 72-1034. Birch et ux *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 470 F. 2d 808.

No. 72-1037. Diggs et al. *v.* Shultz, Secretary of the Treasury, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 152 U. S. App. D. C. 313, 470 F. 2d 461.

No. 72-1042. Stone *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 170.

No. 72-1050. Kommanvittselskapet Harwi (Rolf Wigand) et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 467 F. 2d 456.

No. 72-1051. Rosenberg *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 72-1066. Riva *v.* Kleindienst, Attorney General, et al. C. A. 3d Cir. Certiorari denied. Reported below: 460 F. 2d 1121.

No. 72-1078. Javor *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 481.

No. 72-1079. Rosenfield *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 469 F. 2d 598.

No. 72-1109. Central School District No. 1 et al. *v.* Russo. C. A. 2d Cir. Certiorari denied. Reported below: 469 F. 2d 623.

No. 72-1123. Williams *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 72-1126. Hattersley *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 487 S. W. 2d 354.

No. 72-1150. Dallas Cabana, Inc., et al. *v.* Collier, Trustee in Bankruptcy. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 606.

No. 72-1157. Air Cargo, Inc., et al. *v.* Breen Air Freight, Ltd., et al. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 767.

No. 72-1158. Building & Construction Trades Council of Philadelphia & Vicinity et al. *v.* Altemose Construction Co. Sup. Ct. Pa. Certiorari denied. Reported below: 449 Pa. 194, 296 A. 2d 504.

No. 72-1177. Wellco Co. *v.* Franklin. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 5 Ill. App. 3d 731, 283 N. E. 2d 913.

No. 72–1190. Alarid et al. *v.* New Mexico Board of Bar Examiners. Sup. Ct. N. M. Certiorari denied. Reported below: 84 N. M. 472, 505 P. 2d 67.

No. 72–1202. Valley Oil Co. *v.* City of Garland, Texas. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 482 S. W. 2d 342.

No. 72–1225. City of New Orleans et al. *v.* New Orleans Firefighters Assn., Local 632, et al. Sup. Ct. La. Certiorari denied. Reported below: 263 La. 649, 269 So. 2d 194.

No. 72–1252. Yodice *v.* Koninklijke Nederlandsche Stoomboot Maatschappij. C. A. 2d Cir. Certiorari denied. Reported below: 471 F. 2d 705.

No. 72–5802. Robinson *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 72–5950. Buford *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 4 Ill. App. 3d 533, 281 N. E. 2d 345.

No. 72–5956. Weathington *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 262 So. 2d 724.

No. 72–5958. Bell *v.* Illinois. App. Ct. Ill., 4th Jud. Dist. Certiorari denied. Reported below: 4 Ill. App. 3d 397, 280 N. E. 2d 487.

No. 72–5961. Kelly *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 2d 262.

No. 72–5974. Echeverria *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 468 F. 2d 632.

No. 72–5982. Redus *v.* Swenson, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 2d 606.

No. 72-5992. MEEKINS *v.* UNITED STATES; and
No. 72-6154. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72-5993. SULLIVAN *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 72-6006. WHAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 485 S. W. 2d 275.

No. 72-6055. SCREETON *v.* HUTTO, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied.

No. 72-6059. OLIVER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 72-6060. TOLBERT *v.* BRAGAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 72-6076. ESPARZA-RAMIREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72-6095. HOLLAND *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 72-6097. FIGGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 952.

No. 72-6102. MCCULLOUGH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72-6108. WHITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 469 F. 2d 1404.

No. 72-6109. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72-6110. MIRAMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 1362.

No. 72–6116. JENNINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 471 F. 2d 1310.

No. 72–6117. OWENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6120. COUNTS *v.* UNITED STATES; and

No. 72–6142. ELAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 471 F. 2d 422.

No. 72–6121. HULL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6125. DICKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6131. WARD *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 72–6133. LANDIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6135. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–6137. GUZMAN-AYON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6140. GIANNONI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 136.

No. 72–6144. PREZZI *v.* SCHELTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 469 F. 2d 691.

No. 72–6146. SUEL *v.* ADDINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 889.

No. 72–6148. RATLIEF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72-6147. **Williams** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 470 F. 2d 1339.

No. 72-6159. **Jordan** *v.* **United States.** C. A. 4th Cir. Certiorari denied.

No. 72-6163. **Cotten et al.** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 471 F. 2d 744.

No. 72-6165. **Hook** *v.* **United States.** C. A. 9th Cir. Certiorari denied.

No. 72-6222. **Sparrow** *v.* **United States.** C. A. 10th Cir. Certiorari denied. Reported below: 470 F. 2d 885.

No. 72-6226. **Figueroa** *v.* **Zelker, Correctional Superintendent.** C. A. 2d Cir. Certiorari denied.

No. 72-6235. **Bond** *v.* **Ohio.** Sup. Ct. Ohio. Certiorari denied. Reported below: 32 Ohio St. 2d 43, 289 N. E. 2d 900.

No. 72-6242. **McKinley et al.** *v.* **Federal National Mortgage Assn.** App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 40 App. Div. 2d 1084, 338 N. Y. S. 2d 589.

No. 72-6246. **High** *v.* **Washington.** Ct. App. Wash. Certiorari denied.

No. 72-6247. **Carter** *v.* **Estelle, Corrections Director.** C. A. 5th Cir. Certiorari denied.

No. 72-6251. **Luster** *v.* **Cedars of Lebanon et al.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72-6261. **Joseph** *v.* **Ohio.** Ct. App. Ohio, Summit County. Certiorari denied.

No. 72-6253. JACKSON *v.* WARDEN. C. A. 4th Cir. Certiorari denied.

No. 72-6256. SNELL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 72-6263. CHRISTIAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 27 Cal. App. 3d 554, 103 Cal. Rptr. 740.

No. 72-6264. KRIKMANIS *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 72-6267. BRIGGS ET AL. *v.* OHIO SAVINGS & TRUST CO. ET AL. Ct. App. Ohio, Tuscarawas County. Certiorari denied.

No. 72-6273. BOYD *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 84 N. M. 290, 502 P. 2d 315.

No. 72-6276. COLBERT *v.* APEX CARPET FINISHERS, INC., ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 229 Ga. 770, 194 S. E. 2d 468.

No. 72-6277. HANSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 53 Ill. 2d 79, 289 N. E. 2d 611.

No. 72-6289. SMITH *v.* SALINE COUNTY DISTRICT COURT. Sup. Ct. Kan. Certiorari denied.

No. 6294. KAVALIAUSKAS *v.* RILEY ET AL. Sup. Ct. Ill. Certiorari denied.

No. 72-6306. BURTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 6 Ill. App. 3d 879, 286 N. E. 2d 792.

No. 72-6390. THWING *v.* SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 470 F. 2d 351.

No. 72–1038. KRILICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 341.

No. 72–1056. FIORE, DBA FIORE TRUCKING CO. ET AL. *v.* BRENNAN, SECRETARY OF LABOR, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 1149.

No. 72–1134. REIBERT ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 727.

No. 72–1135. CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* BAKER, TRUSTEE, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 857.

No. 72–1151. CITY OF SANTA FE ET AL. *v.* SANGRE DE CRISTO DEVELOPMENT CO., INC. Sup. Ct. N. M. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 84 N. M. 343, 503 P. 2d 323.

No. 72–5002. THOMAS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5732. DELL *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 324.

No. 72–5972. MARTIN *v.* JARRETT, JUDGE. Sup. Ct. App. W. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6122. DUVALL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72-6124. ALFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 718.

No. 72-6145. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72-6252. JOHNSON ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72-6274. PHILLIPS *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 395.

No. 72-937. ZELKER, CORRECTIONAL SUPERINTENDENT *v.* ROBINSON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 468 F. 2d 159.

No. 72-1255. VOWELL, COMMISSIONER OF PUBLIC WELFARE OF TEXAS *v.* LOPEZ. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 471 F. 2d 690.

No. 72-1024. LOCAL 268, BROTHERHOOD OF RAILROAD TRAINMEN, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 471 F. 2d 582.

No. 72-1101. SWORDS *v.* UNITED STATES. C. A. 3d Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72-6048. WILLIAMS *v.* ORISCELLO, SHERIFF, ET AL. C. A. 3d Cir. Certiorari and/or habeas corpus denied.

Rehearing Denied

No. 71-1022. UNITED STATES *v.* BASYE ET AL., 410 U. S. 441;

No. 71-1598. BRENNAN, SECRETARY OF LABOR *v.* ARNHEIM & NEELY, INC., ET AL., 410 U. S. 512;

No. 72-56. MARKLE ET AL. *v.* ABELE ET AL., 410 U. S. 951;

No. 72-730. MARKLE ET AL. *v.* ABELE ET AL., 410 U. S. 951;

No. 72-841. ECLIPSE FUEL ENGINEERING CO. *v.* MAXON PREMIX BURNER CO., INC., 410 U. S. 929;

No. 72-908. JOFTES *v.* WEXLER ET AL., 410 U. S. 966;

No. 72-946. MUSTO *v.* UNITED STATES, 410 U. S. 982;

No. 72-959. YOUNG *v.* UNITED STATES, 410 U. S. 967;

No. 72-5195. SMITH *v.* SUPREME COURT OF OKLAHOMA, 409 U. S. 1126;

No. 72-5726. FURGERSON *v.* CASPER, 410 U. S. 933;

No. 72-5745. LOPEZ *v.* CALIFORNIA, 410 U. S. 959;

No. 72-5882. WALKER *v.* ALABAMA, 410 U. S. 939;

No. 72-6014. TODD *v.* CARDWELL, WARDEN, 410 U. S. 970;

No. 72-6100. GERARDI *v.* FAVER, 410 U. S. 981; and

No. 72-6129. GERARDI *v.* MACLAUGHLIN ET AL., 410 U. S. 981. Petitions for rehearing denied.

No. 72-434. BYRN, GUARDIAN *v.* NEW YORK CITY HEALTH & HOSPITALS CORP. ET AL., 410 U. S. 949. Motion of Mrs. Arlethia Gilliam et al. for leave to file a brief as *amici curiae* in support of rehearing granted. Petition for rehearing denied.

No. 72-5401. CASON *v.* CITY OF COLUMBUS, 409 U. S. 1053. Motion for leave to supplement petition for rehearing granted. Petition for rehearing denied.

No. 72-5677. HESSEL *v.* ARIZONA ET AL., 410 U. S. 933. Petition for rehearing and other relief denied.

No. 72-766. Calabro *v.* United States, 410 U. S. 926;

No. 72-5099. DuBose *v.* Craven, Warden, et al., 409 U. S. 1130; and

No. 72-5173. Waddell *v.* North Carolina, 409 U. S. 952. Motions for leave to file petitions for rehearing denied.

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Affirmed on Appeal

No. 72-993. Sager et ux. *v.* Burgess of Pottstown et al. Affirmed on appeal from D. C. E. D. Pa. Reported below: 350 F. Supp. 1310.

No. 72-1104. R-C Motor Lines, Inc. *v.* United States et al. Affirmed on appeal from D. C. M. D. Fla. Reported below: 350 F. Supp. 1169.

No. 72-1234. Silverman, Administrator *v.* Browning et al. Affirmed on appeal from D. C. Conn. Mr. Justice Douglas would note probable jurisdiction and set case for oral argument. Reported below: 359 F. Supp. 173.

Appeals Dismissed

No. 71-1263. Kahn et ux. *v.* Arizona State Tax Commission. Appeal from Ct. App. Ariz. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of substantial federal question. Reported below: 16 Ariz. App. 17, 490 P. 2d 846.

Mr. Justice Douglas, with whom Mr. Justice Brennan concurs, dissenting.

Appellants, after exhausting administrative remedies, brought suit in the Superior Court of the State of Arizona to recover personal income tax assessments paid under protest for the years 1967-1969. The assessments in question were imposed on the income of the appellant husband (hereafter appellant) which he earned while being employed, first as a law clerk and then later as an attorney for the Navajo Tribe. Appellant's salary was paid out of Indian tribal funds. Appellant and his wife, who are not Indians, resided within the reservation. The Superior Court dismissed the suit for failure to state a claim upon which relief could be granted. The Arizona Supreme Court affirmed the dismissal.

Appellant's employment was controlled by 25 U. S. C. § 81, which governs the conditions under which contracts can be made with Indian tribes or Indians. Even more specifically, appellant's employment was subject to the regulations promulgated by the Secretary of the Interior in 25 CFR §§ 72.1–72.25. Under these regulations, any attorney performing legal services for the Indian tribe must have his employment contract, which includes fees and expenses, approved by the Secretary of the Interior. (25 CFR § 72.1.) In addition, in determining the appropriateness of the fees, the amount of tribal funds held in the tribal treasury, not otherwise appropriated and available for payment, must be considered. (25 CFR § 72.5.) Tribal funds may not be used for payment of attorney fees and expenses in the absence of express authorization by Congress. (25 CFR § 72.6.) In order to be eligible to act as an attorney for an Indian tribe, the area director must review the applying attorney's references and qualifications (25 CFR § 72.4) and transmit a recommendation to the Secretary of the Interior. In order to be qualified to provide such representation, the attorney must be admitted to practice before the Department of the Interior and the bureaus thereof. (25 CFR § 72.2.) An attorney performing legal services for an Indian tribe is subject to criminal penalties for the violation of the statutes governing attorney contracts with Indian tribes (18 U. S. C. § 438), and can be fired by the Secretary of the Interior (*Udall* v.

Littell, 125 U. S. App. D. C. 89, 366 F. 2d 668, cert. denied, 385 U. S. 1007).

As this Court recently stated in *McClanahan* v. *Arizona State Tax Comm'n, ante,* p. 164, at 168, " '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' *Rice* v. *Olson,* 324 U. S. 786, 789 (1945)." In *McClanahan* the Court rejected the theory that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation, may not extend.

In *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S. 685, this Court struck down a state attempt to assess a 2% tax on the "gross proceeds of sales, or gross income" of the Warren Trading Post Co., which did retail trading with Indians on the reservation under a license granted by the Commissioner of Indian Affairs. The Court emphasized the comprehensive federal regulatory scheme applicable to persons doing business as Indian traders, which granted the Commissioner of Indian Affairs the authority to appoint the traders, specify the types of goods sold, and regulate the actual running of the business. The Court concluded that these apparently all-inclusive regulations and statutes would be sufficient to show that Congress had taken the business of Indian trading on reservations so fully in hand that no room remained for state laws imposing additional burdens.

Part of the Court's reasoning in *Warren Trading Post, supra,* was that "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." Therefore, the Court concluded that "[t]his state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable." *Id.*, at 690, 691.

These policy considerations should also be controlling here. Attorneys providing legal services for Indian tribes are subject to strict Federal Government regulation and control, from the very selection of counsel through negotiations of the employment contract to approval of the form and content of such contract, including fees, and criminal sanctions for the breach of these regulations.

Legal representation has become an important avenue by which the Indian tribes can attempt to salvage a decent lifestyle. Very simply, a skilled professional can afford to take a lower salary if he does not have to pay income taxes to the State. As in the situation of a tax on the income of a trading post, an additional tax on these essential services could indeed "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable."

I would note probable jurisdiction and not dispose of the case without full argument and briefing.

No. 72–871. SILVERS *v.* DOWLING, JUDGE, ET AL. Appeal from Sup. Ct. La. Motion to dispense with printing jurisdictional statement and motion to dispense with printing motion to dismiss or affirm granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–1007. MULLARKEY, ADMINISTRATOR *v.* FLORIDA FEED MILLS, INC., ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 268 So. 2d 363.

No. 72–1206. Reader's Digest Assn., Inc. *v.* Washington. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 81 Wash. 2d 259, 501 P. 2d 290.

No. 72–6255. Ruderer *v.* United States et al. Appeal from D. C. E. D. Ill. dismissed for want of jurisdiction. Mr. Justice Blackmun took no part in the consideration or decision of this appeal.

Certiorari Granted—Vacated and Remanded

No. 72–1130. Denham et al., dba Denham Co. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded with instructions to remand case to the National Labor Relations Board for such further proceedings as may be appropriate in light of *Burns International Security Services, Inc.* v. *NLRB,* 406 U. S. 272 (1972). *FTC* v. *Sperry & Hutchinson Co.,* 405 U. S. 233, 245–250 (1972); *SEC* v. *Chenery Corp.,* 318 U. S. 80, 87–88 (1943). Reported below: 469 F. 2d 239.

No. 72–6347. Bumpus *v.* Massachusetts. Sup. Jud. Ct. Mass. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for reconsideration in light of *Ham* v. *South Carolina,* 409 U. S. 524 (1973). Reported below: — Mass. —, 290 N. E. 2d 167.

Miscellaneous Orders

No. 72–550. Bradley et al. *v.* State Board of Education of Virginia et al. C. A. 4th Cir. [Certiorari granted, 409 U. S. 1124.] Motion of Black Parents of Atlanta, Georgia, for leave to file an untimely brief as *amici curiae* in support of petitioners granted. Mr. Justice Powell took no part in the consideration or decision of this motion.

No. 72-694. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.;

No. 72-753. ANDERSON *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.;

No. 72-791. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.; and

No. 72-929. CHERRY ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, 410 U. S. 980.] Motion of National Jewish Commission on Law & Public Affairs for leave to file an untimely brief as *amicus curiae* granted.

No. 72-5443. BARNES *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 409 U. S. 1037.] Motion for appointment of counsel granted. It is ordered that Malcolm H. Mackey, Esquire, of Los Angeles, California, a member of the Bar of this Court, be, and he is hereby, appointed *nunc pro tunc* to serve as counsel for petitioner in this Court.

No. 72-6259. THERIAULT ET AL. *v.* ESTABLISHMENT OF RELIGION ON TAXPAYERS' MONEY IN THE FEDERAL BUREAU OF PRISONS ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 72-6298. CARTER *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 72-671. ESPINOZA ET VIR *v.* FARAH MANUFACTURING CO., INC. C. A. 5th Cir. Certiorari granted. Reported below: 462 F. 2d 1331.

No. 72–1176. North Dakota State Board of Pharmacy *v.* Snyder's Drug Stores, Inc. Sup. Ct. N. D. Certiorari granted. Reported below: 202 N. W. 2d 140.

No. 72–1188. Richardson, Secretary of Defense, et al. *v.* Reservists Committee to Stop the War et al. C. A. D. C. Cir. Certiorari granted.

No. 72–777. Cleveland Board of Education et al. *v.* LaFleur et al. C. A. 6th Cir. Motion to dispense with printing petitioners' supplemental brief granted. Certiorari granted and case set for oral argument with No. 72–1129 [immediately *infra*]. Reported below: 465 F. 2d 1184.

No. 72–1129. Cohen *v.* Chesterfield County School Board et al. C. A. 4th Cir. Certiorari granted and case set for oral argument with No. 72–777 [immediately *supra*]. Reported below: 474 F. 2d 395.

No. 72–1052. Morton, Secretary of the Interior *v.* Ruiz et ux. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 462 F. 2d 818.

No. 72–1148. Cupp, Penitentiary Superintendent *v.* Naughten. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 476 F. 2d 845.

Certiorari Denied. (See also No. 72–871, *supra.*)

No. 72–1012. Parks *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 267 So. 2d 302.

No. 72–1077. Walters *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 72–1092. Cassity *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 317.

No. 72-1085. Combs *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 468 F. 2d 1390.

No. 72-1095. Stockwell *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 1186.

No. 72-1098. Ortega *v.* United States; and

No. 72-1103. Orsini *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 471 F. 2d 1350.

No. 72-1099. Russo *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 681.

No. 72-1102. International Union of Operating Engineers, Local 57 *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 72-1140. Gasparino *v.* New York. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 72-1184. Choctaw County Board of Education *v.* Cole. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 777.

No. 72-1186. Top Vision Cable Co. of Kentucky *v.* City of Owensboro et al. Ct. App. Ky. Certiorari denied. Reported below: 487 S. W. 2d 283.

No. 72-1205. Stove, Furnace & Allied Appliance Workers' International Union of North America, AFL-CIO, Local 123-B *v.* Gaffers & Sattler, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 860.

No. 72-1233. Texas Mortgage Co. *v.* Phillips Petroleum Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 497.

No. 72-1269. Davidson *v.* Long Island Railroad Co. C. A. 2d Cir. Certiorari denied. Reported below: 469 F. 2d 1404.

No. 72-6026. Davis *v.* United States et al. C. A. 8th Cir. Certiorari denied.

No. 72-6034. Pipito *v.* Cady, Warden. C. A. 7th Cir. Certiorari denied.

No. 72-6038. Miller *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72-6128. Lacey *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 1179.

No. 72-6143. McGann *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 72-6158. Bueno *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 154.

No. 72-6166. Kelly *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 72-6173. Hillman *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 72-6174. Ragin *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 72-6176. Justice *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 72-6178. Battaglia *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 686.

No. 72-6194. McAnulty *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 469 F. 2d 254.

No. 72-6181. Plante *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 472 F. 2d 829.

No. 72-6192. Stevison *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 143.

No. 72-6195. Nelson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 952.

No. 72-6207. Carballea-Cusidor et al. *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 72-6210. Huff *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 72-6297. McGann *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 72-6311. Nutter *v.* Reagan, Governor of California, et al. C. A. 9th Cir. Certiorari denied.

No. 72-6318. Landes *v.* Pageant-Poseidon, Ltd. C. A. 2d Cir. Certiorari denied.

No. 72-6320. Turner *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 72-6331. Smith *v.* Missouri. C. A. 8th Cir. Certiorari denied.

No. 72-6333. Portelli *v.* LaVallee, Correctional Superintendent. C. A. 2d Cir. Certiorari denied. Reported below: 469 F. 2d 1239.

No. 72-6337. Campbell *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 72-6339. Howard *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 229 Ga. 839, 195 S. E. 2d 14.

No. 72-6340. Rudman *v.* Stone, Correctional Superintendent. C. A. 9th Cir. Certiorari denied.

No. 72-6341. Masqua *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 210 Kan. 419, 502 P. 2d 728.

No. 72-6343. Bernatowicz *v.* Twomey, Warden. C. A. 7th Cir. Certiorari denied.

No. 72-6346. Sowder *v.* City of Cincinnati. Sup. Ct. Ohio. Certiorari denied.

No. 72-6354. Baker *v.* Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 72-6356. Lombardi *v.* New York Post et al. C. A. 2d Cir. Certiorari denied.

No. 72-6360. Hallowell *v.* Delaware. Sup. Ct. Del. Certiorari denied. Reported below: — Del. —, 298 A. 2d 330.

No. 72-6361. Bryant *v.* Prescott et al. C. A. D. C. Cir. Certiorari denied.

No. 72-6362. Dostal *v.* Novak, Correction Administrator. C. A. 6th Cir. Certiorari denied.

No. 72-983. Lightman *v.* Maryland. Ct. App. Md. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 266 Md. 550, 295 A. 2d 212.

No. 72-1096. Nadaline et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 471 F. 2d 340.

No. 72-1142. Melton et ux. *v.* Young et al. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 465 F. 2d 1332.

No. 72-6183. Smith *v.* United States. Ct. App. D. C. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 295 A. 2d 64.

No. 72-1274. STILSON ET UX. *v.* READER'S DIGEST ASSN., INC., ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 28 Cal. App. 3d 270, 104 Cal. Rptr. 581.

No. 72-6167. GIORDANO, AKA GINO, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 906.

No. 72-1208. PORZUCZEK, GUARDIAN *v.* TOWNER ET AL. Ct. App. Cal., 1st App. Dist. Motion to dispense with printing petition granted. Certiorari denied.

No. 72-6083. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 1299.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Petitioner was originally charged with removing a United States Treasury check from the mail, in violation of 18 U. S. C. § 1702, and uttering a forged Treasury check, in violation of 18 U. S. C. § 495. After a jury trial, petitioner was convicted on the obstruction-of-the-mails charge but acquitted on the uttering charge. Thereafter, petitioner was granted a new trial.[1]

Prior to the new trial, a superseding indictment was returned, which repeated the charge of removing a United States Treasury check from the mail in violation of 18 U. S. C. § 1702, but charged forgery of a Treasury check in violation of 18 U. S. C. § 495, rather than the uttering charge on which petitioner had been previously acquitted. Petitioner moved to dismiss the forgery count, contending that his acquittal at the first trial on the charge of uttering a forged instrument barred the Government from proving, at a second trial, that he was the forger. The District Court denied the motion. The Government moved to dismiss the obstruction-of-the-mails charge.[2] Petitioner waived his right to jury trial and on a stipulation to the facts alleged in this count was found guilty of forgery.

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[1] The trial judge died before sentencing petitioner, and the case was reassigned to another judge who imposed sentence. Unnoticed in the transfer was the fact that the petitioner's motion for a new trial had never been ruled upon. When this was discovered, petitioner was granted a new trial.

Petitioner urges that both the forgery and uttering charges should have been prosecuted in a single trial. I would agree. As was stated in the dissent in *Ashe* v. *Swenson,* 397 U. S. 436, 452: "Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening." The instant action is a prime example of how the prosecution, with the hindsight of what developed at the initial trial, can thereafter choose another phase of the criminal transaction on which to indict a defendant and force him to go through the emotional and monetary strains of additional litigation.

I would adopt the interpretation of the Double Jeopardy Clause urged by the dissent in *Ashe.* Except in limited circumstances, the prosecution should be required to join in one trial all the charges against a single defendant which grow out of a single criminal act, occurrence, episode, or transaction. Only such an interpretation of the Double Jeopardy Clause will promote justice, economy, and convenience, as well as guard against vexatious prosecutions. Such an interpretation is imperative in light of the virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution.

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[2] The Government gave the petitioner the option of going to trial on either the charge of forgery or the charge of taking the check from the mails. Petitioner chose the forgery count, expressly acknowledging that he chose it even though the penalties thereunder were the more severe.

No. 72–6127. EGGER *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to amend petition granted. Certiorari denied. Reported below: 470 F. 2d 1179.

No. 72–6190. DOUVER *v.* UNITED STATES. C. A. 9th Cir. Motions of Jack Harris, Jr., and Joe Mack Harris for leave to join in petition for writ of certiorari denied. Certiorari denied. Reported below: 472 F. 2d 472.

No. 72–6206. NEELY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 449 Pa. 3, 295 A. 2d 75.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

This case presents a question which this Court has not previously answered—under what circumstances a defendant, *prior to sentencing,* may withdraw a guilty plea.[1]

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[1] Although the opinion of MR. JUSTICE MARSHALL concurring in part and dissenting in part in *Santobello* v. *New York,* 404 U. S. 257, 267, joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART, addressed this question, the Court, vacating petitioner's conviction because the State did not abide by a promise made to petitioner at the time of his guilty plea, remanded for a determination "whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, *i. e.,* the opportunity to withdraw his plea of guilty." *Id.,* at 263. In *Dukes* v. *Warden,* 406 U. S. 250, MR. JUSTICE MARSHALL, in dissent, joined by me, again addressed this issue. *Id.,* at 259. The Court, however, considered solely whether petitioner's guilty plea had been voluntary when entered. MR. JUSTICE STEWART

Harold Neely, the petitioner, was indicted by a Berks County, Pennsylvania, grand jury on a charge of murder.[2] Although petitioner initially pleaded not guilty at his arraignment on November 20, 1969, when his case was called for trial on March 23, 1970, he pleaded guilty on the advice of counsel and with the consent of the district attorney to the lesser included offense of voluntary manslaughter. There is no question that the trial judge, in accepting the plea, complied with the mandate of *Boykin* v. *Alabama,* 395 U. S. 238, that the record disclose that the plea was entered voluntarily and understandingly. At the same time, upon motion of the district attorney, the charge of murder was withdrawn.

On April 23, 1970, petitioner filed a petition for a rule to show cause why he should not be permitted to withdraw his plea. He alleged that the plea was induced upon advice of counsel "that should the defendant take the witness stand in his own defense, he is the same as any other witness and his credibility is in issue, and that the Commonwealth therefore may introduce evidence of his prior criminal record of conviction . . . ."[3] At the

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concurred on the understanding that the case did not properly present an instance where the defendant had moved to withdraw his guilty plea before judgment. *Id.,* at 258.

[2] The indictment charged that "on or about July 18, 1969, in said County, the said Harold Neely, feloniously, wilfully and of his malice aforethought did kill and murder Richard Earl Williams, all of which is against the peace and dignity of the Commonwealth of Pennsylvania."

[3] The rule to show cause also alleged "[t]hat your petitioner is of the opinion that the Act of March 15, 1911, P. L. 20, Section 1 (19 P. S. 711) prohibits cross-examination by the Commonwealth of a Defendant as to his prior conviction for impeachment purposes unless the Defendant himself has placed his good character and reputation in issue." That Act provides in relevant part:

"Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and, if asked, shall hearing on his petition, which was not held until September 2, 1970, petitioner testified that he had "a statement from a Ronnie Templeton who was an eyewitness originally for the State, who now changes his statement and says he was at another place and that the State's chief witness was with him at the time the shooting occurred, and makes it impossible for any one of them to have seen the incident at all."

The trial judge, without explication, ruled that both asserted reasons for withdrawing the guilty plea were "without merit" and stated that the court was "not aware of any unusual circumstances being present whereby justice will best be served by submitting the case to a jury." The petition to withdraw the plea was dismissed, and petitioner subsequently was sentenced. The Supreme Court of Pennsylvania affirmed.[4] 449 Pa. 3, 295 A. 2d

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not be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation; unless,—

"One. He shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or,

"Two. He shall have testified at such trial against a co-defendant, charged with the same offense."

The State, in its answer to the rule to show cause, responded that "the line of cases interpreting this section have allowed the Commonwealth to introduce evidence of a Defendant's prior criminal record of conviction of felonies or of misdemeanors in the nature of crimen falsi for the purpose of affecting his credibility where a Defendant takes the witness stand in his own defense."

[4] Three judges, concurring, would have adopted Standard 2.1 (b) of the American Bar Association Project on Standards for Criminal Justice, Pleas of Guilty (Approved Draft 1968), which provides:

"In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty

75. I would grant the petition for a writ of certiorari and set the case for oral argument.

A guilty plea constitutes a waiver of the fundamental rights to a jury trial, *Duncan* v. *Louisiana,* 391 U. S. 145; to confront one's accusers, *Pointer* v. *Texas,* 380 U. S. 400; to remain silent, *Malloy* v. *Hogan,* 378 U. S. 1; and to be convicted by proof beyond all reasonable doubt, *In re Winship,* 397 U. S. 358. In short, we have recognized a "right not to plead guilty." *United States* v. *Jackson,* 390 U. S. 570, 581. It is because of the waiver of these rights and that a guilty plea is itself a conviction that a guilty plea "demands the utmost solicitude." *Boykin* v. *Alabama, supra,* at 243.

The court below in essence ruled that a defendant may not withdraw a guilty plea prior to sentencing unless there are "unusual circumstances . . . whereby justice will best be served by submitting the case to a jury." In my view, this standard deprived petitioner of the full panoply of fundamental rights subsumed within the right not to plead guilty. I would hold, instead, that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment." *Santobello* v. *New York,* 404 U. S. 257, 267–268 (MARSHALL, J., concurring in part and dissenting in part); see *Dukes* v. *Warden,* 406 U. S. 250, 257 (STEWART, J., concurring).

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or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea."

They concluded that under this standard the trial judge had not abused his discretion in refusing to allow petitioner to withdraw his plea.

I start with the premise that under our system of criminal justice a defendant is presumed innocent until proved guilty. Moreover, due process of law requires that a person be convicted by proof beyond all reasonable doubt. *In re Winship, supra.* A guilty plea, if it is to be consistent with these principles, should not be allowed to stand if the defendant upon reflection or additional developments seeks *in good faith* to exercise his right to trial. I cannot accept a concept of irrevocable waiver of constitutional rights, at least where the government will not suffer substantial prejudice in restoring those rights. The criminal process is not a contest where the government's success is necessarily measured by the number of convictions it obtains, regardless of the methods used. A conviction after trial accords with due process only if it is based upon a full and fair presentation of all the relevant evidence which bears upon the guilt of the defendant. See, *e. g., Brady* v. *Maryland,* 373 U. S. 83, 87–88. Similarly, a guilty plea should not be a trap for the unwary or unwilling. We should not countenance the "easy way out" for the State merely because it has induced a guilty plea through a plea bargain.

It is true, of course, that the guilty plea plays an important role in the administration of the criminal law. See, *e. g., Santobello* v. *New York, supra,* at 260. But, the mere interest of the government in avoiding a full-blown trial cannot outweigh the interests of the defendant, when he asserts sufficient reasons, valid on their face, for withdrawing a guilty plea. See *Dukes* v. *Warden, supra,* at 257–258 (STEWART, J., concurring). Here the petitioner claimed that he pleaded guilty on the basis of a misunderstanding of applicable law. Also, he had reason to believe that a key prosecution witness would not testify as originally expected. Presumably, petitioner believed in good faith that he might present a successful defense to the charge of murder. In its opposition to the motion to withdraw the plea, the State did not assert any prejudice whatsoever if the plea were withdrawn. Only now, in its opposition to the petition for a writ of certiorari, does the State claim prejudice: "[I]n the truest sense, the Commonwealth does change its position because it requires a total rescheduling of cases with all the difficulties encountered by the calling of witnesses." This conclusory allegation, absent a showing that the State has suffered inroads on its ability to maintain a prosecution, is not sufficient to override the vindication of petitioner's fundamental constitutional rights.

Rehearing Denied

No. 71–1332. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT ET AL. *v.* RODRIGUEZ ET AL., *ante,* p. 1;

No. 71–1371. ROSARIO ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL., 410 U. S. 752;

No. 72–842. BRADLEY *v.* FLORIDA, *ante,* p. 916;

No. 72–1010. OHIO MUNICIPAL JUDGES ASSN. ET AL. *v.* DAVIS ET AL., *ante,* p. 144;

No. 72–5860. MURRAY *v.* MISSISSIPPI, *ante,* p. 907;

No. 72–6186. GERARDI *v.* SEAMANS, SECRETARY OF THE AIR FORCE, *ante,* p. 913;

No. 72–6187. GERARDI *v.* JOHNSON, ADMINISTRATOR OF VETERANS AFFAIRS, *ante,* p. 913; and

No. 72–6188. GERARDI *v.* UNITED STATES DEPARTMENT OF JUSTICE, *ante,* p. 913. Petitions for rehearing denied.

No. 71–6778. WILLIAMS *v.* CALIFORNIA, 409 U. S. 1073; and

No. 72–5161. SAFFIOTI *v.* UNITED STATES, 409 U. S. 908. Motions for leave to file petitions for rehearing denied.

No. 72-794. Papish *v.* Board of Curators of the University of Missouri et al., 410 U. S. 667. Motion of Citizens for Decent Literature, Inc., for leave to file a brief as *amicus curiae* in support of rehearing granted. Petition for rehearing denied.

April 24, 1973

*Miscellaneous Order**

Certiorari Granted. (See No. 72-11, *ante,* p. 389.)

May 1, 1973

Dismissals Under Rule 60

No. 72-6114. Matthews *v.* United States District Court for the Middle District of Florida. Motion for leave to file petition for writ of mandamus dismissed under Rule 60 of the Rules of this Court.

No. 72-6451. Martinez *v.* United States. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 471 F. 2d 652.

May 4, 1973

Miscellaneous Order

No. A-1110. Doe et al. *v.* Bellin Memorial Hospital et al. Application to vacate stay order of Honorable John Paul Stevens of the United States Court of Appeals for the Seventh Circuit, dated May 3, 1973, presented to Mr. Justice Rehnquist, and by him referred to the Court, denied. Mr. Justice White and Mr. Justice Marshall took no part in the consideration or decision of this order.

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*For Court's order prescribing Bankruptcy Rules and Official Bankruptcy Forms, see *post,* p. 991.

MAY 7, 1973

Affirmed on Appeal

No. 72-1003. MERTES *v.* MERTES ET AL. Affirmed on appeal from D. C. Del. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 350 F. Supp. 472.

No. 72-1334. FINCHER *v.* SCOTT ET AL. Affirmed on appeal from D. C. M. D. N. C. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 352 F. Supp. 117.

Appeals Dismissed

No. 72-1238. BEENE ET AL. *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 263 La. 865, 269 So. 2d 794.

No. 72-6149. HOUSE *v.* ST. AGNES HOSPITAL, INC., ET AL. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72-6260. WITZKOWSKI *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of final judgment.

No. 72-6271. RUDERER *v.* VANCE ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal.

Certiorari Granted—Vacated and Remanded. (See also No. 72-6011, *ante,* p. 618.)

No. 71-1562. CHOUNG *v.* LOWE, SHERIFF. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial District, ante,* p. 345. Reported below: 456 F. 2d 176.

No. 71-6836. Gunston *v.* Superior Court of Alameda County. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial District, ante,* p. 345.

Miscellaneous Orders

No. D-9. In re Disbarment of Thaler. It having been reported that Seymour R. Thaler of New York, New York, has been disbarred from the practice of law in all of the courts of the State of New York, and this Court by order of February 20, 1973 [410 U. S. 921], having suspended the said Seymour R. Thaler from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon respondent and that the time within which to file a return to the rule has expired;

It is ordered that the said Seymour R. Thaler be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 72-812. Storer et al. *v.* Brown, Secretary of State of California, et al. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, 410 U. S. 965.] Motion of Committee for Democratic Election Laws for leave to file a brief as *amicus curiae* in support of appellants granted.

No. 72-1428. Eller et al. *v.* Vaughns et al. C. A. 4th Cir. Motion to advance and for *pendente lite* relief denied.

No. 72-6272. HIGGS *v.* SCHLESINGER, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 72-6348. IN RE STYPMANN;

No. 72-6407. MAJCHSZAK, AKA MAJORS *v.* UNITED STATES;

No. 72-6421. LODDY *v.* WYOMING ET AL.; and

No. 72-6437. HAWKINS *v.* MEACHAM, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72-1171. GARNER *v.* CHAMBERS, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 72-1058. O'BRIEN ET AL. *v.* SKINNER, SHERIFF, ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 31 N. Y. 2d 317, 291 N. E. 2d 134.

No. 72-1125. ALLEE ET AL. *v.* MEDRANO ET AL. Appeal from D. C. S. D. Tex. Probable jurisdiction noted. Reported below: 347 F. Supp. 605.

Certiorari Granted

No. 72-1019. SEA-LAND SERVICES, INC. *v.* GAUDET, ADMINISTRATRIX. C. A. 5th Cir. Certiorari granted. Reported below: 463 F. 2d 1331.

No. 72-1195. AMERICAN PIPE & CONSTRUCTION CO. ET AL. *v.* UTAH ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 473 F. 2d 580.

No. 72-1168. UNITED STATES *v.* MAZE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 468 F. 2d 529.

No. 72–1231. NATIONAL LABOR RELATIONS BOARD *v.* SAVAIR MANUFACTURING CO. C. A. 6th Cir. Certiorari granted. Reported below: 470 F. 2d 305.

No. 72–1264. MAYOR OF PHILADELPHIA *v.* EDUCATIONAL EQUALITY LEAGUE ET AL. C. A. 3d Cir. Motion of respondents to dispense with printing response and certiorari granted. Reported below: 472 F. 2d 612.

No. 71–6852. LUBIN *v.* ALLISON, REGISTRAR-RECORDER OF COUNTY OF LOS ANGELES. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* and certiorari granted. In addition to questions presented in the petition, parties should address themselves to question whether it is the candidate's indigency or the indigency of his supporting group that is the relevant issue in this case.

Certiorari Denied. (See also No. 72–6149, *supra.*)

No. 72–274. COHEN *v.* HONGISTO, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–786. BASEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 194.

No. 72–951. SALEM EQUIPMENT, INC., ET AL. *v.* KOCKUM INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 61.

No. 72–981. PIERRO *v.* UNITED STATES; and
No. 72–6266. PANICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 865.

No. 72–1068. SVEJCAR *v.* UNITED STATES; and
No. 72–1069. GRIZAFFI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 69.

No. 72–1091. HEITZLER *v.* O'NEILL, CHIEF JUSTICE, SUPREME COURT OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 472 F. 2d 789.

No. 72–1086. DeLong Corp. et al. *v.* Oregon, by and through State Highway Commission. Sup. Ct. Ore. Certiorari denied. Reported below: See 9 Ore. App. 550, 495 P. 2d 1215.

No. 72–1100. Jenning *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 72–1124. Hydrocraft, Inc., et al. *v.* Panther Pumps & Equipment Co., Inc. C. A. 7th Cir. Certiorari denied. Reported below: 468 F. 2d 225.

No. 72–1127. O. M. Scott & Sons Co. *v.* Noll et al., Trustees. C. A. 6th Cir. Certiorari denied. Reported below: 467 F. 2d 295.

No. 72–1133. Morris et al. *v.* Werner-Continental, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 466 F. 2d 1185.

No. 72–1137. City of New Haven *v.* Town of East Haven et al. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 148.

No. 72–1138. Harrison *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 72–1141. De Pompeis *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 878.

No. 72–1144. Lomprez et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 472 F. 2d 860.

No. 72–1156. Parenti *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 1175.

No. 72–1160. Lucas *v.* United States; and

No. 72–6232. Jiminez *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 72–1174. SAGLIMBENE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 471 F. 2d 16.

No. 72–1175. LOBUE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–1189. JOHNSON ET AL. *v.* WARNER, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 1216.

No. 72–1192. BOSTIC *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 1388.

No. 72–1216. BAKER ET AL. *v.* F & F INVESTMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 778.

No. 72–1226. BRIERLEY, WARDEN *v.* PHELAN. C. A. 3d Cir. Certiorari denied.

No. 72–1230. YOUNG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–1237. SERVICE INVESTMENT CO., INC. *v.* STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA. C. A. 6th Cir. Certiorari denied.

No. 72–1241. ILLMAN *v.* TOLEDO BAR ASSN. Sup. Ct. Ohio. Certiorari denied.

No. 72–1242. DURELL PRODUCTS, INC. *v.* AJAX REALTY CORP. C. A. 4th Cir. Certiorari denied. Reported below: 493 F. 2d 818.

No. 72–1248. MULTARI EQUIPMENT CORP. ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 40 App. Div. 2d 836, 337 N. Y. S. 2d 295.

No. 72–1263. WILK ET AL. *v.* YELLOW FREIGHT SYSTEM, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 72-1258. HEITZLER *v.* CINCINNATI BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 32 Ohio. St. 2d 214, 291 N. E. 2d 477.

No. 72-1261. DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION *v.* DETROIT NEWSPAPER PUBLISHERS ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 872.

No. 72-1273. COHEN *v.* MONGIARDO ET AL. Super. Ct. N. J. Certiorari denied.

No. 72-1276. COLEMAN OIL CO., INC. *v.* CITIES SERVICE OIL CO. C. A. 1st Cir. Certiorari denied. Reported below: 470 F. 2d 925.

No. 72-1277. RAFTER *v.* BLACKMON ET AL. C. A. 2d Cir. Certiorari denied.

No. 72-1278. BOARD OF JUNIOR COLLEGE DISTRICT NO. 515 ET AL. *v.* HOSTROP. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 488.

No. 72-1280. DAMCO TESTERS, INC., ET AL. *v.* SUPERIOR TESTERS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 629.

No. 72-1283. MR. BOSTON DISTILLER CORP. ET AL. *v.* PALLOT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 337.

No. 72-1286. CIRAOLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 419.

No. 72-1326. BUFORD ET AL. *v.* SOUTHEAST DUBOIS COUNTY SCHOOL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 472 F. 2d 890.

No. 72-5964. BLACK ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 52 Ill. 2d 544, 288 N. E. 2d 376.

No. 72-5797. Williams *v.* Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 72-5995. Haywood *v.* Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 72-6066. Richard *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72-6080. Kruse *v.* Gagnon, Warden. C. A. 7th Cir. Certiorari denied.

No. 72-6084. Boag *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 72-6086. White *v.* Brough, Warden. C. A. 4th Cir. Certiorari denied.

No. 72-6092. Jones *v.* Missouri. C. A. 8th Cir. Certiorari denied.

No. 72-6093. Carter *v.* Gupton, Judge, et al. Sup. Ct. Tex. Certiorari denied.

No. 72-6094. Brittain *v.* Whalen et al. C. A. 7th Cir. Certiorari denied.

No. 72-6096. Cole *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 262 So. 2d 902.

No. 72-6112. Conklin *v.* Britton, Warden. C. A. 10th Cir. Certiorari denied.

No. 72-6151. Morris *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 72-6162. Nelson *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 3d 463, 503 P. 2d 1322.

No. 72-6171. Dempsey *v.* Wainwright, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 72-6175. Dean *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 72-6177. Ellis *v.* Twomey, Warden. C. A. 7th Cir. Certiorari denied.

No. 72-6179. Hayles et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 788.

No. 72-6202. Page *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 72-6209. Rivers *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 468 F. 2d 1355.

No. 72-6216. Anderson *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 72-6218. Goodwin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 893.

No. 72-6228. Baltierra-Frausto *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 597.

No. 72-6229. Walker *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 72-6234. Rodriquez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 472 F. 2d 982.

No. 72-6236. Jarratt *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 471 F. 2d 226.

No. 72-6239. Bozada *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 473 F. 2d 389.

No. 72-6243. Leach *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 472 F. 2d 130.

No. 72-6245. Colletti *v.* Fare. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72-6248. Culp *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 472 F. 2d 459.

No. 72-6250. Faulkenbery *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 879.

No. 72-6268. Smith *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 474 F. 2d 844.

No. 72-6278. Vasquez-Velasco *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 471 F. 2d 294.

No. 72-6279. Smith *v.* Rodgers, Jail Superintendent. C. A. D. C. Cir. Certiorari denied.

No. 72-6280. Chapman *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 117.

No. 72-6284. Rootes *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 72-6285. Valle-Rojas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 79.

No. 72-6296. Sappington *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 2d 1378.

No. 72-6300. Sprouse *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 472 F. 2d 1167.

No. 72-6305. Malinowski *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 472 F. 2d 850.

No. 72-6307. Pigg *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 843.

No. 72-6330. McCloud *v.* Gowan et al. C. A. 5th Cir. Certiorari denied.

No. 72-6369. Cosco *v.* Meacham et al. Sup. Ct. Wyo. Certiorari denied.

No. 72-6371. Padilla *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 72-6380. Mock *v.* Rose, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 472 F. 2d 619.

No. 72-6381. Jones *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 72-6382. Neal *v.* Howard Johnson, Inc., et al. Ct. App. Ga. Certiorari denied. Reported below: 126 Ga. App. 560, 191 S. E. 2d 350.

No. 72-6383. Stahl *v.* Henderson, Warden. C. A. 5th Cir. Certiorari denied.

No. 72-6387. Woolsey *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1407.

No. 72-6397. Oller *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 72-6399. Ellison *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 72-6403. Aldabe *v.* Aldabe et al. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 72-6409. Hawkins *v.* Hawkins. Sup. Ct. N. C. Certiorari denied.

No. 72-6416. Muery *v.* Muery. Sup. Ct. Ala. Certiorari denied.

No. 72-6423. Mendes *v.* Brotherhood of Railway & Airline Clerks, Freight Handlers, Express & Station Employees, AFL-CIO-CLC, et al. C. A. 2d Cir. Certiorari denied.

No. 72-6417. Richardson *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 487 S. W. 2d 719.

No. 72-6471. Pizzolato *v.* Secretary, Department of Health, Education, and Welfare. C. A. 2d Cir. Certiorari denied.

No. 72-992. Murray *v.* Virginia. Sup. Ct. Va. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 72-1136. Weatherford et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 471 F. 2d 47.

No. 72-1159. Habig et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 474 F. 2d 57.

No. 72-1244. Clark *v.* Holmes et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 474 F. 2d 928.

No. 72-6106. Blackman *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 265 So. 2d 734.

No. 72-6257. Mitchell *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 472 F. 2d 1223.

No. 72-6262. Harvey *v.* United States. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 463 F. 2d 1022.

No. 72-6374. Rando *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 471 F. 2d 651.

No. 72-6378. THOMAS *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 657.

No. 72-6472. TURNER *v.* CLINCHFIELD RAILROAD CO. Ct. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 489 S. W. 2d 257.

No. 72-976. WOODBURY ET AL. *v.* COLLER, JUDGE, ET AL. Sup. Ct. Ohio. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 31 Ohio St. 2d 195, 287 N. E. 2d 802.

No. 72-1149. CARTER ET AL. *v.* STRAIGHT ET AL. Ct. App. Ohio, Gallia County. Motion to dispense with printing petition granted. Certiorari denied.

No. 72-1161. GENERAL MOTORS CORP. *v.* DEVEX CORP. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 467 F. 2d 257.

No. 72-1272. BELTRONE *v.* GENERAL MOTORS CORP. ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 72-6213. HUNTER *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 72-1253. WALSH, TRUSTEE IN BANKRUPTCY, ET AL. *v.* CEDOR ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 470 F. 2d 996.

No. 72–5572. GAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was convicted of larceny. The District of Columbia Court of Appeals reversed. 241 A. 2d 446. The United States Court of Appeals reversed the latter court, 133 U. S. App. D. C. 337, 410 F. 2d 1036, and remanded the case to the District of Columbia Court of Appeals for a ruling on the propriety of the trial court's instruction. That court held that the instructions had not been prejudicial, 259 A. 2d 593, and the United States Court of Appeals affirmed. Thereafter petitioner sought relief by way of *coram nobis*. The trial court dismissed the case without prejudice and the District of Columbia Court of Appeals affirmed.

During the time petitioner's original or direct appeal was being considered by the court, Frank Q. Nebeker was Assistant United States Attorney in charge of the Appellate Section in the office of the United States Attorney for the District. One of his duties was to review the appellate briefs submitted by that office to the appellate courts. His name was on the brief opposing petitioner on the appeal. He was named to the District of Columbia Court of Appeals by President Nixon in May of 1969.

When the *coram nobis* action was brought to the District of Columbia Court of Appeals it was heard by a three-judge panel which included Judge Nebeker.

His prior role in the case was not brought to his attention and he doubtless was unaware of the fact that this case had been one of the many hundreds he had processed while in the United States Attorney's office.

Nonetheless Canon 3C (1)(b) of the recently adopted Code of Judicial Conduct provides:

> "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where . . . he served as lawyer in the matter in controversy . . . ."

This Canon, as it applies to this case, is merely a reflection of the basic concept of due process of law that a person should not serve as both prosecutor and judge.

The matter might not be considered of any great moment here if the three judges in the panel had taken part. But one of the three, Judge Yeagley, did not participate in the decision. Hence, in one view there was only a single qualified judge sitting on the appeal. That fact makes singularly appropriate the suggestion of the Solicitor General that it may be just, under the circumstances, to vacate the judgment of the District of Columbia Court of Appeals and remand for further proceedings. I would do just that.

Although this issue may not rise to the level of a constitutional question and there is no federal statute involved, we should take this action under our supervisory authority over the administration of justice in the federal courts. See, *e. g., Mallory* v. *United States,* 354 U. S. 449, 452–453; *McNabb* v. *United States,* 318 U. S. 332, 341; *Nardone* v. *United States,* 308 U. S. 338, 341–342. The District of Columbia Court of Appeals, established by Congress pursuant to Art. I, § 8, cl. 17, of the Constitution,[1] clearly is within the parameters of the federal court system. See *Embry* v. *Palmer*, 107 U. S. 3, 10; *Moss* v. *United States*, 23 App. D. C. 475, 482-483. The judges of that court are appointed, with the advice and consent of the Senate, by the President.[2] It is true, of course, that this Court normally will not review decisions of the courts of the District of Columbia which involve merely questions of "local law." See, *e. g., General Motors Corp.* v. *District of Columbia*, 380 U. S. 553, 556-557; *Griffin* v. *United States*, 336 U. S. 704, 717-718. To this extent the courts of the District may be comparable to state courts.[3] Nevertheless, we heretofore have exercised jurisdiction where a decision "has an impact not confined to the Potomac's shores . . . ." *General Motors Corp.* v. *District of Columbia*, *supra*, at 556. See also *Miller* v. *United States*, 357 U. S. 301, 306.

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[1] See § 111 of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 475, D. C. Code Ann. § 11–101 (2)(A) (Supp. V, 1972). We discussed the differences between "legislative," or Art. I, courts and "constitutional," or Art. III, courts

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in *Palmore* v. *United States*, *ante*, p. 389, and *Glidden Co.* v. *Zdanok*, 370 U. S. 530.

[2] District of Columbia Court Reform and Criminal Procedure Act of 1970, D. C. Code Ann. § 11-1501 (a).

[3] The House Report states that the District of Columbia Court of Appeals will be "the highest court in the jurisdiction, similar to a state Supreme Court," H. R. Rep. No. 91-907, p. 23, and that "[t]he jurisdictional changes recommended by your Committee will result in a Federal-State court system in the District of Columbia analogous to the court systems in the several States." *Id.*, at 35.

The Senate Report states:

"This constitutional authority for the creation of a local court system, distinct from the Federal court system established pursuant to article III, has been recognized in *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 (1923); *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930); and *O'Donoghue* v. *United States*, 289 U. S. 516 (1933). The committee believes that there is nothing in the result reached in *Glidden* v. *Zdanok*, 370 U. S. 530 (1962), which denies the congressional authority to create a local court system for the District of Columbia which is distinct from the Federal court system." S. Rep. No. 91-405, p. 18.

The statement that the new D. C. court system is "distinct from the Federal court system" obviously relates only to the distinction between Art. I and Art. III courts. See n. 1, *supra*.

In this case any appearance of impropriety may reflect adversely on the federal judiciary as a whole. Canon 1 of the Code of Judicial Conduct states that "[a]n independent and honorable judiciary is indispensable to justice in our society." Canon 2 provides that a judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and the commentary to that Canon states that he "must avoid all impropriety and appearance of impropriety." We must bear the ultimate responsibility, within the limits of our jurisdiction,[4] for insuring that the federal judiciary adheres scrupulously to these principles of impartial adjudication.

Rehearing Denied

No. 60, Orig. PENNSYLVANIA *v.* NEW YORK ET AL., 410 U. S. 978;

No. 71–1515. RODOVICH *v.* UNITED STATES, 409 U. S. 846;

No. 72–921. NEWPORT ASSOCIATES, INC. *v.* SOLOW, 410 U. S. 931;

No. 72–1015. TRED-AIR OF CALIFORNIA, INC. *v.* NATIONAL LABOR RELATIONS BOARD, *ante,* p. 906;

No. 72–1080. PELTZMAN *v.* AMERICAN RADIO ASSN. ET AL., *ante,* p. 916;

No. 72–1082. BENNERS, EXECUTRIX *v.* CITY OF UNIVERSITY PARK, *ante,* p. 901; and

No. 72–5066. ROSS *v.* UNITED STATES, 410 U. S. 990. Petitions for rehearing denied.

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[4] This Court has jurisdiction under 28 U. S. C. § 1257 (3). See District of Columbia Court Reform and Criminal Procedure Act of 1970, *supra,* § 11–102. Under 28 U. S. C. § 2106, we may vacate the judgment below and "require such further proceedings to be had as may be just under the circumstances."

While four of us would grant certiorari and vacate the judgment, we do not insist on oral argument.

No. 72-5707. **Bassett** *v.* **Smith, Warden**, 410 U. S. 991;

No. 72-5725. **Polak** *v.* **Craven, Warden**, 410 U. S. 984;

No. 72-5811. **Large** *v.* **Ohio**, 410 U. S. 912;

No. 72-5897. **Brown** *v.* **Cardwell, Warden**, *ante*, p. 907;

No. 72-5985. **Harris** *v.* **Weinberger, Secretary of Health, Education, and Welfare**, 410 U. S. 986;

No. 72-5986. **Penix** *v.* **Weinberger, Secretary of Health, Education, and Welfare**, 410 U. S. 986;

No. 72-6091. **Lee** *v.* **Alabama**, *ante*, p. 908; and

No. 72-6170. **Kaplan** *v.* **Judges of the United States Court of Appeals for the Second Circuit et al.**, *ante*, p. 905. Petitions for rehearing denied.

No. 71-6742. **Hurtado et al.** *v.* **United States**, 410 U. S. 578. Motion for leave to file petition for rehearing denied.

No. 72-1115. **Rozelle** *v.* **Connecticut General Life Insurance Co. et al.**, *ante*, p. 921. Motion tendering payment of money judgment presented to Mr. Justice White, and by him referred to the Court, denied. Motion to stay decision on petition for rehearing denied. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

May 14, 1973

Affirmed on Appeal

No. 72-264. **Parker, Treasurer of Louisiana, et al.** *v.* **Levy et al.** Affirmed on appeal from D. C. M. D. La. Reported below: 346 F. Supp. 897.

No. 72-6446. **Winston et al.** *v.* **Scott, Attorney General of Illinois, et al.** Affirmed on appeal from D. C. N. D. Ill.

Appeals Dismissed

No. 72–1112. COFFEE-RICH, INC., ET AL. *v.* FIELDER, DIRECTOR OF AGRICULTURE, ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 27 Cal. App. 3d 792, 104 Cal. Rptr. 252.

No. 72–1287. MAGER ET UX. *v.* HILLTOWN TOWNSHIP. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. Reported below: 6 Pa. Commw. 90, 293 A. 2d 631.

Certiorari Granted—Vacated and Remanded

No. 72–965. UNITED STATES *v.* KNIGHT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Russell, ante,* p. 423.

No. 72–1240. SPITZER AKRON, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded with instructions to remand case to the National Labor Relations Board for such further proceedings as may be appropriate in light of *Burns International Security Services, Inc.* v. *NLRB,* 406 U. S. 272 (1972). *FTC* v. *Sperry & Hutchinson Co.,* 405 U. S. 233, 245–250 (1972); *SEC* v. *Chenery Corp.,* 318 U. S. 80, 87–88 (1943); *Bachrodt Chevrolet Co.* v. *NLRB, ante,* p. 912; *Denham* v. *NLRB, ante,* p. 945. Reported below: 470 F. 2d 1000.

No. 72–6303. MODEL CITIES POLICY BOARD OF ANN ARBOR ET AL. *v.* LYNN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to consider question of mootness.

Miscellaneous Orders

No. A–1083 (72–1441). Phillips *v.* United States. C. A. 7th Cir. Application for bail presented to Mr. Justice Douglas, and by him referred to the Court, denied. Reported below: 474 F. 2d 1351.

No. A–1111. Friends of the Earth et al. *v.* Armstrong, Commissioner, Bureau of Reclamation, Department of the Interior, et al. Application to vacate stay order of the United States Court of Appeals for the Tenth Circuit, dated May 1, 1973, presented to Mr. Justice White, and by him referred to the Court, denied.

No. 71–1332. San Antonio Independent School District et al. *v.* Rodriguez et al., 411 U. S. 1. Motions of respondents for leave to proceed *in forma pauperis nunc pro tunc* and to retax costs denied.

No. 72–6191. Carter *v.* Heard, Judge;

No. 72–6406. Dean *v.* United States Court of Appeals for the First Circuit; and

No. 72–6426. Wilson *v.* Swygert, Chief Judge, U. S. Court of Appeals, et al. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Postponed

No. 72–1297. Johnson, Administrator of Veterans' Affairs, et al. *v.* Robison. Appeal from D. C. Mass. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Case set for oral argument with No. 72–700 [*Hernandez* v. *Veterans Administration*], *infra.* Reported below: 352 F. Supp. 848.

Certiorari Granted

No. 72–1328. United States *v.* Kahn et ux. C. A. 7th Cir. Certiorari granted. Reported below: 471 F. 2d 191.

No. 72–700. Hernandez et al. *v.* Veterans' Administration et al. C. A. 9th Cir. Motion to dispense with printing petition and certiorari granted. Case set for oral argument with No. 72–1297 [*Johnson* v. *Robison*], *supra*. Reported below: 467 F. 2d 479.

No. 72–948. National Cable Television Assn., Inc. *v.* United States et al. C. A. 5th Cir. Certiorari granted and case set for oral argument with No. 72–1162 immediately *infra*. Reported below: 464 F. 2d 1313.

No. 72–1162. Federal Power Commission *v.* New England Power Co. et al. C. A. D. C. Cir. Certiorari granted and case set for oral argument with No. 72–948 immediately *supra*. Reported below: 151 U. S. App. D. C. 371, 467 F. 2d 425.

No. 72–1289. National Railroad Passenger Corp. et al. *v.* National Association of Railroad Passengers. C. A. D. C. Cir. Certiorari granted. Mr. Justice Powell took no part in the consideration or decision of this petition. Reported below: 154 U. S. App. D. C. 214, 475 F. 2d 325.

No. 72–6160. Mitchell *v.* W. T. Grant Co. Sup. Ct. La. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 263 La. 627, 269 So. 2d 186.

Certiorari Denied

No. 72–846. Ball, Director, Department of Agriculture of Michigan, et al. *v.* Armour & Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 468 F. 2d 76.

No. 72–1172. Milner, dba Belvedere Driving School, et al. *v.* Burson, Director, Georgia Department of Public Safety, et al. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 870.

No. 72-1046. SAN JACINTO JUNIOR COLLEGE ET AL. *v.* HANDER. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 619.

No. 72-1191. KAHN *v.* UNITED STATES; and

No. 72-1193. TELEPROMPTER CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 472 F. 2d 272.

No. 72-1199. CULPEPPER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 906.

No. 72-1204. PEARSON CANDY CO., A DIVISION OF W. R. GRACE & CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 471 F. 2d 11.

No. 72-1214. SILVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 469 F. 2d 1404.

No. 72-1282. BOWSER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 72-1288. UNITED PACIFIC INSURANCE CO. *v.* DISCOUNT CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 792.

No. 72-1292. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS *v.* REEVE ALEUTIAN AIRWAYS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 990.

No. 72-1294. WASHINGTON KELPERS ASSN. *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 81 Wash. 2d 410, 502 P. 2d 1170.

No. 72-1308. SHUTLER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 470 F. 2d 1143.

No. 72-1303. TUBBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 166.

No. 72-1348. KUHLMAN ET AL. *v.* SIEGLER, ADMINISTRATRIX. Sup. Ct. Wash. Certiorari denied. Reported below: 81 Wash. 2d 448, 502 P. 2d 1181.

No. 72-6090. KING *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied.

No. 72-6182. CORDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72-6200. VARNER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72-6205. FORD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 487 S. W. 2d 1.

No. 72-6211. LUCAS *v.* WYOMING ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 505 P. 2d 1270.

No. 72-6240. LANHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 906.

No. 72-6254. HARVELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72-6270. TATUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72-6275. TEMPLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 652.

No. 72-6283. BRANCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1017.

No. 72-6302. EVANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72-6304. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 72-6301. THERIAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 359.

No. 72-6313. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 731.

No. 72-6314. TUCKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72-6317. STAMPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 652.

No. 72-6319. DERKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 72-6323. PYE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 267 So. 2d 827.

No. 72-6325. THERIAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 486.

No. 72-6326. BIDDLE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72-6327. KNOX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72-6328. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 293.

No. 72-6334. HURT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72-6338. DEGRAFFENREID *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 471 F. 2d 23.

No. 72-6349. CATANIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 464 F. 2d 1301.

No. 72-6352. Lowes *v.* Weinberger, Secretary of Health, Education, and Welfare. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1406.

No. 72-6410. Walters *v.* Walters, Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied.

No. 72-6422. Fullen *v.* Washington et al. Ct. App. Wash. Certiorari denied. Reported below: 7 Wash. App. 369, 499 P. 2d 893.

No. 72-6431. Craig *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1405.

No. 72-6433. Rogers *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 2d 916, 292 N. E. 2d 788.

No. 72-6438. Fritz *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 490 S. W. 2d 30.

No. 72-6439. Williams *v.* Estelle, Corrections Director. Ct. Crim. App. Tex. Certiorari denied.

No. 72-6441. Matthews *v.* Wingo, Warden. C A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 1266.

No. 72-6444. Salazar *v.* New Mexico. C. A. 10th Cir. Certiorari denied.

No. 72-6452. Morris *v.* Sparrow et al. Ct. App. Ky. Certiorari denied.

No. 72-6453. Flint *v.* Glasgow, State's Attorney of Piatt County, Illinois, et al. C. A. 7th Cir. Certiorari denied.

No. 72-6544. Elliott *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 856.

No. 72-470. SLAYTON, PENITENTIARY SUPERINTENDENT *v.* HAIRSTON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 459 F. 2d 1382.

No. 72-1113. PENNSYLVANIA *v.* LOPINSON. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 449 Pa. 33, 296 A. 2d 524.

No. 72-1323. NORVELL, WARDEN *v.* JONES ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 472 F. 2d 1185.

No. 72-1054. TYLER JUNIOR COLLEGE ET AL. *v.* LANSDALE ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 659.

No. 72-1145. NEWSOME *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 1399.

No. 72-1152. CEMENT MASONS UNION LOCAL 337, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION OF UNITED STATES & CANADA, AFL-CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 1187.

No. 72-1194. KAHN ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 191.

No. 72-1220. RICHARDSON *v.* HAMILTON INTERNATIONAL CORP. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 1382.

No. 72-1203. SIMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 652.

No. 72-1257. UNITED NEW YORK SANDY HOOK PILOTS ASSN. ET AL. *v.* DENT, SECRETARY OF COMMERCE, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 1176.

No. 72-5695. KEETON *v.* PROCUNIER ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 810.

No. 72-6168. FOXWORTH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 267 So. 2d 647.

No. 72-6345. KIMBEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 652.

No. 72-1185. FIELDS ET AL. *v.* SCHUYLER, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari. Reported below: 153 U. S. App. D. C. 229, 472 F. 2d 1304.

No. 72-1315. COLORADO PUMP & SUPPLY CO. *v.* FEBCO, INC., ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE would grant certiorari. Reported below: 472 F. 2d 637.

Rehearing Denied

No. 72-797. BOWERS ET AL. *v.* UNITED STATES, 410 U. S. 927. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 72-5456. FLORES *v.* EMPLOYERS' FIRE INSURANCE COMPANY OF SAN ANTONIO, TEXAS, 409 U. S. 1046. Motion for leave to file petition for rehearing denied.

No. 36, Orig. TEXAS *v.* LOUISIANA, 410 U. S. 702;

No. 72–5831. ROTHSTEIN ET AL. *v.* WYMAN, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL., *ante,* p. 921;

No. 72–6117. OWENS *v.* UNITED STATES, *ante,* p. 935; and

No. 72–6204. LEBRUN *v.* CUPP, PENITENTIARY SUPERINTENDENT, *ante,* p. 919. Petitions for rehearing denied.

BANKRUPTCY RULES AND OFFICIAL BANKRUPTCY FORMS

Effective October 1, 1973

The Bankruptcy Rules and Official Bankruptcy Forms were prescribed by the Supreme Court of the United States on April 24, 1973, pursuant to 28 U. S. C. § 2075, and were reported to the Congress by THE CHIEF JUSTICE on the same date. For letter of transmittal, see *post*, p. 990. The Judicial Conference report referred to in that letter is not reproduced herein. These rules and forms became effective on October 1, 1973, as provided in paragraph 2 of the Court's order, *post*, p. 991.

For earlier publication of Bankruptcy Rules and Forms, see, *e. g.*, 368 U. S. 1043.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 24, 1973

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court, I have the honor to submit to the Congress the Bankruptcy Rules and Official Forms covering General Bankruptcy cases (Chapters I–VII of the Bankruptcy Act) and the Chapter XIII Rules and Official Forms prescribed pursuant to Section 2075, Title 28, United States Code. MR. JUSTICE DOUGLAS dissents from the adoption of these rules and forms.

Accompanying these rules and forms is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes which were submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER,
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

TUESDAY, APRIL 24, 1973

ORDERED:

1. That the rules and forms as approved by the Judicial Conference of the United States, to be known as the Bankruptcy Rules and Official Bankruptcy Forms, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act, in the proceedings and to the extent set forth therein, in the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands.

[See *infra*, pp. 995–1141.]

2. That the aforementioned Bankruptcy Rules and Official Bankruptcy Forms shall take effect on October 1, 1973, and shall be applicable to proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That General Orders in Bankruptcy 1 to 7 inclusive, 9 to 12 inclusive, 14 to 26 inclusive, 28 to 40 inclusive, 42 to 45 inclusive, 47, 50, 51, 53, and 56 and Official Forms in Bankruptcy 1 to 13 inclusive, 15 to 20 inclusive, 22 to 47 inclusive, and 70 to 72 inclusive, heretofore prescribed by this Court, be, and they hereby are, abrogated, effective October 1, 1973.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the said new Bankruptcy Rules and Official Bankruptcy Forms to the Congress at its present session on or before the first day of May, 1973.

ORDERED:

1. That the rules and forms as approved by the Judicial Conference of the United States, to be known as the Chapter XIII Rules and Official Chapter XIII Forms, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the forms of process, writs, pleadings, and motions and the practice and procedure under Chapter XIII of the Bankruptcy Act, in the proceedings and to the extent set forth therein, in the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands.

[See *infra,* pp. 1143–1215.]

2. That the aforementioned Chapter XIII Rules and Official Chapter XIII Forms shall take effect on October 1, 1973, and shall be applicable to proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That General Order in Bankruptcy 55 and Official Forms in Bankruptcy 58 to 62 inclusive, heretofore prescribed by this Court, be, and they hereby are, abrogated, effective October 1, 1973.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the said new Chapter XIII Rules and Official Chapter XIII Forms to the Congress at its present session on or before the first day of May, 1973.

MR. JUSTICE DOUGLAS, dissenting.

I cannot agree to the Court's submission of the proposed Bankruptcy Rules to the Congress.

Once I was knowledgeable in the bankruptcy field, having taught the course for some years, made my own field studies of it, and written extensively about various bankruptcy problems. I worked closely with Cong. Walter Chandler to produce the Bankruptcy Act of 1938, 52 Stat. 840. In that Act the advisory committee of which I was a member kept all power to punish for contempt in the hands of the district court and out of the hands of the referees. Section 41 of the 1938 Act was derived from § 41 of the 1898 Act, 30 Stat. 556.

The proposed new Rule 920 makes a change, giving referees power to cite and punish for contempt in both the civil and criminal sense. Misbehavior during a hearing or so near the place thereof as to obstruct the same under the proposed Rule may be punished summarily, if the referee saw or heard the conduct and it was committed in his actual presence. All other contempts imposed by a referee must be only after notice and hearing.

The Advisory Notes call this grant of power to the referees "minor," since referees will not be allowed to imprison an offender or fine him more than $250. But the proposed Rule does change § 41 of the present Act which has been with us at least since 1898.

I once knew most of the referees in the Nation and worked with them on various projects. But they, too, flourish under Parkinson's Law; and their power grows like that of a prince in a medieval kingdom. That may not be ominous when it relates only to administrative detail. But it is for me alarming to vest appointees of bankruptcy courts with the power to punish for contempt. Chief Justice Taft in *Cooke* v. *United States,* 267 U. S. 517, 539, noted that the exercise of contempt power is "a delicate one and care is needed to avoid arbitrary or oppressive conclusions." Great differences of view have been expressed in this Court over the scope of the "contempt" power of judges. Mr. Justice Black, with whom I concurred, said in dissent in *Frank* v. *United States,* 395 U. S. 147, 160: "Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general."

Walter Nelles long ago reminded us that summary procedure of contempt is a "legal thumb-screw," the "most autocratic of judicial powers," and "in practice the most indefinite." Summary Power to Punish for Contempt, 31 Col. L. Rev. 956, 957 (1931). *In re Oliver,* 333 U. S. 257, 274, marked the scope of the contempt power as being " 'the least possible power adequate to the end proposed.' " Extension of the contempt power to administrative arms of the bankruptcy court is not consistent with close confinement of the contempt power. The cases indicate how great emotional outbursts are wrapped up in the exercise of the contempt power. *Sacher* v. *United States,* 343 U. S. 1. I would not extend the contempt power to bankruptcy referees. Perhaps I am wrong. But that issue has never been considered, debated, or voted upon by this Court. The Court is merely the conduit for the Rules. It does not purport to approve or disapprove. As I have said on other like occasions, it has merely placed its imprimatur on the Rules without reading, let alone discussing, these Rules.

Forty years ago I had perhaps some expertise in the field; and I know enough about history, our Constitution, and our decisions to oppose the adoption of Rule 920. But for most of these Rules I do not have sufficient insight and experience to know whether they are desirable or undesirable. I must, therefore, disassociate myself from them.

If these Rules go to the Congress they should be sent by the Judicial Conference, not by this Court.

RULES OF BANKRUPTCY PROCEDURE

TITLE I
BANKRUPTCY RULES

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TITLE I

BANKRUPTCY RULES

Rule 1. Scope of bankruptcy rules and forms; short title.

The rules and forms in this Title I govern the procedure in courts of bankruptcy in bankruptcy cases under Chapters I–VII of the Bankruptcy Act. These rules may be known and cited as the Bankruptcy Rules. These forms may be known and cited as the Official Bankruptcy Forms.

PART I. PETITION AND PROCEEDINGS RELATING THERETO AND TO ADJUDICATION

Rule 101. Commencement of bankruptcy case.

A bankruptcy case is commenced by filing a petition with the court by or against a person for the purpose of obtaining his adjudication as a bankrupt.

Rule 102. Reference of cases; withdrawal of reference and assignment.

(*a*) *Reference.*—Upon the filing of a petition the clerk shall refer the case forthwith to a referee or, if a local rule so provides, to more than one referee concurrently. Thereafter all proceedings in the case shall be before the referee except as otherwise provided by subdivision (b) of this rule, by Rules 115 (b), 409 (c), and 920, by § 2a (15) of the Act when a complaint seeks an injunction to restrain a court, by § 43c of the Act when the office of the referee is vacant, and by the provisions in the Act and the rules in Part VIII governing appeals from judgments of the referee.

(*b*) *Withdrawal of reference and assignment.*—The district judge may, at any time, for the convenience of parties or other cause, withdraw a case in whole or in part from a referee and either act himself or assign the case or part thereof to another referee in the district.

Rule 103. Voluntary petition.

A voluntary petition shall conform substantially to Official Form No. 1. An original and 2 copies of the petition shall be filed, unless a different number of copies is required by local rule.

Rule 104. Involuntary petition.

(*a*) *Form and number.*—An involuntary petition shall conform substantially to Official Form No. 9. An original and 2 copies of the petition shall be filed, unless additional copies are required by local rule.

(*b*) *Participation in act of bankruptcy.*—A creditor may not file or join in a petition alleging the commission of an act of bankruptcy other than the sixth act, if he consented to, participated in, or secured the commission of the act alleged. Notwithstanding the foregoing, if a creditor, without inducing it, participated in any general assignment, receivership, or other mode of adjustment or settlement of the affairs of the debtor and did not consent in writing thereto, or if he did so consent but without knowledge of facts which would constitute commission of the first, second, or third act of bankruptcy or which would be a bar to the discharge of the debtor in bankruptcy, he may nevertheless act as a petitioning creditor and may allege any act of bankruptcy including such assignment or receivership.

(*c*) *Particularity of allegations.*—The facts constituting an act of bankruptcy shall be alleged with sufficient particularity to identify the transaction or occurrence.

(*d*) *Transferor or transferee of claim.*—A person who has transferred or acquired a claim for the purpose of commencing a bankruptcy case shall not be a qualified petitioner. A petitioning creditor who is a transferor or transferee of a claim, whether transferred unconditionally, for security, or otherwise, shall annex to the original and each of the 2 copies of the petition a copy of all documents evidencing the transfer, and a signed statement setting forth the consideration for and terms of the transfer and that the claim was not transferred for the purpose of commencing a bankruptcy case.

(*e*) *Joinder of petitioners after filing.*—Creditors other than the original petitioners may join in an involuntary petition at any time before its dismissal. If the answer to an involuntary petition filed by one or 2 creditors avers the existence of 12 or more creditors, the alleged bankrupt shall file with the answer a list of all his creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as counted under § 59e of the Act, the court shall thereupon afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

Rule 105. Partnership bankruptcy.

(*a*) *Voluntary petition.*—A voluntary petition may be filed by all the general partners on behalf of the partnership.

(*b*) *Partner's petition against partnership.*—A petition may be filed by fewer than all the general partners to have a partnership adjudged bankrupt under § 5b of the Act. An original and 2 copies of the petition shall be filed under this subdivision, but if more than one general partner does not join in the petition, an additional copy for each such partner shall be filed. The petition for adjudication of the partnership may be contested by any general partner (or alleged general partner) who is not a petitioner.

(*c*) *Involuntary petition by creditors.*—An involuntary petition may be filed by creditors against a partnership. Within 5 days after the filing, the petitioning creditors shall cause a copy of the petition to be sent by certified mail to the last known address of, or to be delivered to, each general partner who has not been served.

(*d*) *Petition when all general partners are adjudicated.*—If all the general partners of a partnership are adjudged bankrupt, any party in interest may file a petition in any court in which a partner's bankruptcy case is pending to have the partnership adjudged bankrupt.

Rule 106. Caption of petition.

The caption of every petition shall comply with Rule 904 (b). In addition the title of the case as set forth in the caption shall include the name of the bankrupt and all other names used by him within 6 years before the filing of the petition. If the petition is not filed by the bankrupt, the petitioners shall include such other names according to their best information.

Rule 107. Filing fees.

(*a*) *General requirement.*—Except as otherwise provided in subdivision (b), every petition shall be accompanied by the prescribed filing fees.

(*b*) *Payment of filing fees in installments.*

(*1*) *Application for permission to pay filing fees in installments.*—A voluntary petition shall be accepted for filing by the clerk of the district court if accompanied by an application signed by the petitioner for permission to pay the filing fees in installments. The application shall state that the applicant is unable to pay the filing fees except in installments, the proposed terms of such installment payments, and that the applicant has paid no money and transferred no property to his attorney for services in connection with the case. The application shall be filed in duplicate, one copy for the clerk and one for the bankruptcy judge.

(*2*) *Action on application.*—At or prior to the first meeting of creditors, the court after a hearing may make an order permitting the payment of the filing fees in installments to the clerk of the district court, and fixing the number of installments and the amount and date of payment of each installment. The number of installments permitted shall not exceed 4, and the final installment shall be payable not later than 4 months after the filing of the petition. For cause shown, however, the court may extend the time for payment of any installment to a date not later than 6 months after the date of filing of the petition.

(3) *Postponement of attorney's fees.*—Filing fees must be paid in full before the bankrupt may pay his attorney for services in connection with the case.

Rule 108. Schedules and statement of affairs.

(*a*) *Schedules and statement required.*—The bankrupt shall file with the court schedules of all his debts and all his property and a statement of his affairs, prepared by him in the manner prescribed by Official Forms No. 6 and either No. 7 or No. 8, whichever is appropriate. The number of copies of the schedules and statement shall correspond to the number of copies of the petition required by these rules.

(*b*) *Time limits.*—Except as otherwise provided herein, the schedules and statement shall be filed with the petition by a voluntary bankrupt and within 10 days after adjudication by an involuntary bankrupt or by a partnership adjudicated on other than a voluntary petition. A voluntary petition shall nevertheless be accepted by the clerk if accompanied by a list of all the bankrupt's creditors and their addresses, and the schedules and statement may be filed within 10 days thereafter in such case. On application the court may grant up to 10 additional days for the filing of schedules and the statement of affairs; any further extension may be granted only for cause shown and on such notice as the court may direct.

(*c*) *Partnership and partners.*—If the bankrupt is a partnership, the general partners shall prepare and file the schedules of the debts and property and statement of affairs of the partnership. Every general partner not adjudicated shall file a statement of his assets and liabilities with the trustee of the partnership within 10 days after qualification by the trustee or within such further time as may be allowed by the court for cause shown.

(*d*) *Preparation of schedules or statement of affairs on default by bankrupt.*—If the schedules or statement of affairs is not prepared and filed as required by this rule, the court may order the receiver, trustee, a petitioning creditor, or other party in interest to prepare and file any of these papers within such time as the court shall fix.

(*e*) *Interests acquired or arising after bankruptcy.*—Within 10 days after the information comes to his knowledge or within such further time as the court may allow, the bankrupt shall file a supplemental schedule showing the facts regarding (1) any property that vests in him by bequests, devise, or inheritance within 6 months after bankruptcy; (2) any property in which the bankrupt had an estate or interest by the entirety on the date of bankruptcy and which became transferable in whole or in part solely by the bankrupt within 6 months after bankruptcy; and (3) any interests in real property that were nonassignable prior to bankruptcy and that, within 6 months thereafter, became assignable interests or estates, or gave rise to powers in the bankrupt to acquire assignable interests or estates. If any of the property or interests required to be reported under this subdivision is claimed by the bankrupt as exempt, he shall claim his exemption in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case before the duty is or can be performed.

Rule 109. Verification of petitions and accompanying papers.

All petitions, schedules, statements of affairs, and amendments thereto shall be verified.

Rule 110. Amendments of voluntary petitions, schedules, and statements of affairs.

A voluntary petition, schedule, or statement of affairs may be amended as a matter of course at any time before the case is closed. The court may, on application or motion of any party in interest or on its own initiative, order any voluntary petition, schedule, or statement of affairs to be amended. Every amendment under this rule shall be filed in the same number as required of the original paper, and the court shall give notice of the amendment to such persons as it may designate.

Rule 111. Service of petition and process.

Upon the filing of an involuntary petition, the clerk of the district court shall forthwith issue a summons for service on the bankrupt. Upon the filing of a partner's petition against a partnership under Rule 105 (b), the clerk shall forthwith issue a summons for service upon all general partners who are not petitioners. The summons shall conform substantially to Official Form No. 10 and a copy shall be served with a copy of the petition in the manner provided for service of a summons, complaint, and notice of trial by Rule 704 (b), (c), or (i). If service cannot be made as provided in the preceding sentence, the court may order the summons and petition to be served by mailing copies thereof to the last known address, if any, and by at least one publication in such manner and form as the court may direct. The summons and petition may be served anywhere. The provisions of Rule 704 (e), (g), and (h) apply when service is made or attempted under this rule.

Rule 112. Responsive pleading or motion.

The alleged bankrupt in an involuntary petition, or, in the case of a petition against a partnership under subdivision (b) or (c) of Rule 105, any general partner (or alleged general partner) who is not a petitioner, may contest the petition. Rule 12 of the Federal Rules of Civil Procedure applies to the making of a defense or objection to the petition, except that an answer or a motion permitted under Rule 12 (b), (e), or (f) of the Federal Rules of Civil Procedure shall be served and filed within 15 days after the issuance of the summons, but if service is made by publication upon an alleged bankrupt or partner not an inhabitant of nor found within the state in which the district court is held, the court shall prescribe the time for such service and filing of the response. The service of a motion permitted under Rule 12 of the Federal Rules of Civil Procedure shall have the effect prescribed by Rule 712 (a) on the time allowed for serving an answer to the petition, but any motion or answer served on the petitioner must be filed with the court no later than the last day allowed for service of the motion or the answer, as the case may be. The answer to a petition may include the statement of a claim against a petitioning creditor only for the purpose of defeating the petition. No other responsive pleadings shall be allowed, except that the court may order a reply to an answer and prescribe the time for it to be served and filed.

Rule 113. Affirmative defense of solvency.

If a petition alleges the commission of the first act of bankruptcy, the alleged bankrupt shall plead and have the burden of proving the defense of solvency at the date of bankruptcy.

Rule 114. Examination of bankrupt on issue of insolvency or inability to pay debts as they mature.

Whenever a petition filed under Rule 104 alleges the commission of the second, third, or fifth act of bankruptcy or a petition is filed under Rule 105 (b), and the alleged bankrupt denies the allegation of insolvency or inability to pay debts as they mature, the alleged bankrupt shall appear in court at the hearing, and prior thereto if ordered by the court, with books, papers, and accounts, and submit to an examination as to all matters bearing on the issue of insolvency or inability to pay debts as they mature. If the alleged bankrupt fails so to appear or submit to an examination, the court on motion may make such orders in regard to the failure as are just, including those specified in paragraphs (A), (B), and (C), of Rule 37 (b)(2) of the Federal Rules of Civil Procedure. The examination provided by this rule is not exclusive of the procedures available under Rules 121 and 205.

Rule 115. Hearing and disposition of petition.

(*a*) *Contested petition.*—The court shall determine the issues of a contested petition at the earliest practicable time and adjudicate the debtor a bankrupt, dismiss the case, or enter such other order as may be appropriate.

(*b*) *Jury trial.*

(1) An alleged bankrupt may, at or before the time within which an answer may be filed, demand a trial by jury of any issue triable of right by a jury under § 19a of the Act, by serving upon the petitioners a demand therefor in writing and filing it. Such demand may be indorsed upon the answer. If the demand specifies that a district judge conduct the trial or if a local rule of court so provides, the trial shall be placed on the calender of the district court as a jury action; otherwise the referee shall conduct the jury trial. The failure of a party to serve and file a demand in accordance with this rule constitutes a waiver by him of trial by jury or of a jury trial before a district judge, as the case may be.

(2) When trial by jury has been demanded in accordance with this rule, the trial of all issues so demanded shall be by jury unless the alleged bankrupt, by a writing filed with the court or by an oral statement made in open court and entered in the record, consents to trial by the court sitting without a jury. A trial with an advisory jury or a jury trial conducted as of right on consent of the parties may be ordered in accordance with Rule 39 (c) of the Federal Rules of Civil Procedure.

(3) When issues triable of right by jury have been placed on the district court calendar as provided in paragraph (1) of this subdivision, the district judge may order the trial before him of any other issues presented by the pleadings in the interest of expediting the court's business or for other good cause.

(4) Except as provided in subdivision (d) of this rule, Rules 47–51 of the Federal Rules of Civil Procedure apply to a jury trial conducted under this subdivision.

(*c*) *Default.*—If no pleading or other defense to a petition is filed within the time provided by these rules, the court shall on the next day, or as soon thereafter as practicable, make the adjudication or make such other order as may be appropriate.

(*d*) *Adjudication.*—An adjudication shall conform substantially to Official Form No. 11 and shall be entered in the referee's docket or the civil docket of the district court, as the case may be.

(*e*) *Award of costs.*—When a case commenced by the filing of a petition against any person pursuant to Rule 104 (a) or Rule 105 (b) or (c) is dismissed or withdrawn, the court on reasonable notice to the petitioner or petitioners may award to the prevailing party the same costs that are allowed to a prevailing party in a civil action and reasonable counsel fees, and shall award any other sums required by the Act.

Rule 116. Venue and transfer.

(*a*) *Proper venue.*

(*1*) *Natural person.*—A petition by or against a natural person may be filed in the district where the bankrupt has had his principal place of business, residence, or domicile for the preceding 6 months or for a longer portion thereof than in any other district. A petition by or against a natural person who has had no principal place of business, residence, or domicile within the United States during the preceding 6 months may be filed in a district wherein he has property.

(*2*) *Corporation or partnership.*—A petition by or against a corporation or partnership may be filed in the district (A) where the bankrupt has had its principal place of business or its principal assets for the preceding 6 months or for a longer portion thereof than in any other district; or (B) if there is no such district, in any district where the bankrupt has property.

(*3*) *Partner with partnership or copartner.*—Notwithstanding the foregoing: (A) a petition commencing a bankruptcy case may be filed by or against any general partner in a district where a petition under the Act by or against a partnership is pending; (B) a petition commencing a bankruptcy case may be filed by or against a partnership or by or against any other general partner or by or against any combination of the partnership and the general partners in a district where a petition under the Act by or against a general partner is pending.

(*4*) *Affiliate.*—Notwithstanding the foregoing, a petition commencing a bankruptcy case may be filed by or against an affiliate of the bankrupt in a district where a petition under the Act by or against the bankrupt is pending.

(*b*) *Transfer of cases; dismissal or retention when venue improper.*

(*1*) *When venue proper.*—Although a petition is filed in accordance with subdivision (a) of this rule, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct in the interest of justice and for the convenience of the parties, transfer the case to any other district. The transfer may be ordered at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.

(*2*) *When venue improper.*—If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the foregoing, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

(*c*) *Procedure when petitions involving the same bankrupt or related bankrupts are filed in different courts.*—If petitions commencing bankruptcy cases or a bankruptcy case and any other case under the Act are filed in different districts by or against (1) the same bankrupt, or (2) a partnership and one or more of its general partners, or (3) 2 or more general partners, or (4) a bankrupt and an affiliate, the court in which the first petition is filed shall, after hearing on motion and notice to the petitioners and such other persons as the court may designate, determine the court or courts in which the case or cases should proceed in the interest of justice and for the convenience of the parties. The proceedings on the other petitions shall be stayed by the courts in which such petitions have been filed until such determination is made. Thereafter all the courts in which petitions have been filed shall proceed in accordance with the determination.

(*d*) *Reference of transferred cases.*—A case transferred under this rule shall, in accordance with Rule 102 (a), be referred by the clerk of the district court to which it has been transferred.

Rule 117. Consolidation or joint administration of cases pending in same court.

(*a*) *Cases involving same bankrupt.*—If 2 or more petitions are pending in the same court by or against the same bankrupt, the court may order consolidation of the cases.

(*b*) *Cases involving 2 or more related bankrupts.*—If 2 or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) 2 or more general members of a partnership, or (4) a bankrupt and an affiliate, the court may order a joint administration of the estates. Before making such an order the court shall give due consideration to the protection of creditors of the different estates against potential conflicts of interest.

(*c*) *Expediting and protective orders.*—When an order for consolidation or joint administration of 2 or more cases is entered pursuant to this rule, the court, while protecting the rights of the parties under the Act, may make such orders as may tend to avoid unnecessary costs and delay.

Rule 118. Death or insanity of bankrupt.

The death or insanity of the bankrupt shall not abate a bankruptcy case. In such event the estate of the bankrupt shall be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred.

Rule 119. Bankrupt involved in foreign proceeding.

When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

Rule 120. Dismissal of case without determination of merits.

(*a*) *Voluntary dismissal; dismissal for want of prosecution.*—A case shall not be dismissed on application or motion of the petitioner or petitioners or for want of prosecution or by consent of the parties until after hearing on notice to the creditors as provided in Rule 203 (a). To enable the court to give such notice, the bankrupt, if he has not already done so, shall file a list of all his creditors with their addresses within the time fixed by the court. If the bankrupt fails to file such list, the court may by order provide for the preparation and filing of the list in such manner as may be appropriate.

(*b*) *Dismissal for failure to pay filing fees.*

(1) On nonpayment of any installment of the filing fees as ordered pursuant to Rule 107 (b) and after hearing on notice to the bankrupt, the court may dimiss the case.

(2) If a case is dismissed or closed without the payment in full of the filing fees, the installments collected shall be distributed in the same manner and proportions as if the filing fees had been paid in full.

(3) Notice of dismissal for failure to pay the filing fees shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, in the manner provided in Rule 203.

(*c*) *Effect of dismissal.*—Unless the order specifies to the contrary, dismissal of a case otherwise than on the merits is without prejudice.

Rule 121. Applicability of rules in Part VII.

Except as otherwise provided in Part I of these rules and unless the court otherwise directs, the following rules in Part VII apply in all proceedings relating to a contested petition and in all proceedings to vacate an adjudication: Rules 705, 708–710, 715, 716, 724–726, 728–737, 744.1, 752, 756, and 762. The court may direct that one or more of the other rules in Part VII shall also apply in such a proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to proceedings relating to a contested petition or proceedings to vacate an adjudication, and a reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.

Rule 122. Conversion of a chapter case to bankruptcy.

When an order is entered in a Chapter X, XI, XII, or XIII case directing that the case continue as a bankruptcy case, the procedure shall be as follows:

(1) In all respects other than as provided in the following paragraphs, the case shall be deemed to have been commenced as of the date of the filing of the first petition initiating a case under the Act and shall be conducted as far as possible as if no petition commencing a chapter case had been filed.

(2) Unless otherwise directed by the court, lists, inventories, schedules, and statements filed in the superseded case shall be deemed to be the schedules and statement of affairs filed in the bankruptcy case pursuant to Rule 108 and in full compliance therewith; but if no such documents have been previously filed, the bankrupt shall comply with Rule 108 as if he had been adjudicated an involuntary bankrupt on the date of the entry of the order directing that the case continue as a bankruptcy case.

(3) Notice of the order directing that the case continue as a bankruptcy case shall be given to all creditors in the manner provided by Rule 203 within 20 days after entry of the order and shall accompany the notice of the first meeting of creditors if one is held. If no first meeting of creditors is held, the date of the mailing of the notice of the order as provided in this paragraph shall be deemed the first date set for the first meeting of creditors for the purposes of any rule referring to that date to prescribe the time when or within which an act is required or allowed to be done; but if the time for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of the discharge-

ability of any debt had expired in a pending bankruptcy case prior to the filing therein of a chapter petition, the preceding clause of this paragraph shall not be deemed to revive or extend such time.

(4) A trustee shall be appointed by the court and notified pursuant to Rule 209 (c), and shall qualify pursuant to Rule 212, unless

> (A) a trustee has been previously selected pursuant to Rule 209 and has qualified, in which event he shall be immediately notified of the order directing that the case continue as a bankruptcy case and shall enter upon the performance of his duties without further qualification; or
>
> (B) a standby trustee has been nominated in the superseded case, in which event he shall be immediately notified pursuant to Rule 209 (c) and, within 5 days after receipt of notice, shall qualify in the manner provided by Rule 212; or
>
> (C) the court pursuant to Rule 211 orders that no trustee be appointed.

If a trustee notified under this paragraph fails to qualify or to enter upon the performance of his duties, the court shall appoint a trustee pursuant to Rule 209.

(5) All claims filed in the superseded case shall be deemed filed in the bankruptcy case.

(6) Forthwith after qualification of the trustee or entry by him on the performance of his duties as provided in paragraph (4) of this rule, any trustee, receiver, or debtor in possession previously acting in the chapter case shall, unless otherwise ordered, turn over to the trustee in bankruptcy all the records and property of the estate in his possession or subject to his control.

(7) Each trustee, receiver, and debtor in possession acting in the superseded chapter case shall, unless the court otherwise directs, file with the court a final report and account within 30 days after the entry of the order directing that the case continue as a bankruptcy case,

including, in a superseded Chapter X, XI, or XII case, a separate schedule listing unpaid debts incurred by him after the commencement of the chapter case. If the order is entered after confirmation of a plan, the debtor shall file with the court schedules of (A) property not listed in the final report filed pursuant to the preceding sentence of this paragraph and acquired by him after the filing of the original petition under the Act and before the entry of the order directing that the case continue as a bankruptcy case and (B) debts not listed in the final report filed pursuant to the preceding sentence of this paragraph and incurred by him after confirmation and before the entry of such order.

(8) On the filing of a schedule required by the preceding paragraph, the court shall enter an order directing the claims so scheduled, including claims of the United States, any state, and any subdivision thereof, to be filed and shall give notice by mail to the holders thereof to file their claims pursuant to Rule 302 (a)–(d) within 60 days from the entry of the order directing them to be filed, except that claims not scheduled as provided in the preceding paragraph and claims arising from rejection of executory contracts under pragraph (10) of this rule may be filed within such further time as the court may direct.

(9) If the court grants an extension of time for the filing of claims pursuant to Rule 302 (e)(5), the extension shall apply to holders of claims who failed to file within the time prescribed by, or fixed by the court pursuant to, paragraph (8) of this rule, and notice shall be given them in the manner provided in Rule 203 (a).

(10) Rule 607 shall govern the assumption, rejection, and assignment of contracts entered into or assumed by a trustee, receiver, or debtor in possession acting in the superseded chapter case which are executory in whole or in part at the time of the entry of the order directing the case to continue as a bankruptcy case, except that

with respect to a trustee selected as provided in paragraph (4)(A) of this rule the time periods prescribed by Rule 607 shall begin to run from the entry of such order.

PART II. OFFICERS FOR ADMINISTERING THE ESTATE; NOTICES TO CREDITORS; CREDITORS' MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 201. Appointment and duties of receivers.

(*a*) *Purposes and term of receivership.*—Subject to the provisions of this rule, the court may appoint a receiver when necessary in the best interest of the estate (1) to take charge of the property of a bankrupt; (2) to conduct the business of the bankrupt; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter when no trustee has qualified or the interest of the trustee may be adverse to that of the estate. Such appointment shall be terminated when the trustee qualifies or there is no further need for a receiver, and the authorization to conduct the business of the bankrupt after adjudication shall continue only for such time as may be in the best interest of the estate and consistent with orderly liquidation.

(*b*) *Application for appointment.*—An application for appointment of a receiver shall state the specific facts showing the necessity for the appointment.

(*c*) *Appointment before adjudication.*—Before adjudication, appointment of a receiver may be made only on application. The application may be granted only after hearing on notice to the alleged bankrupt and such other parties in interest as the court may designate, except that a receiver may be appointed without notice if irreparable loss to the estate may otherwise result. An application for appointment of a receiver without notice and any order of appointment made without notice shall state what loss may result and why it would be irreparable.

(*d*) *Bond of applicant.*—Before adjudication, no receiver may be appointed unless the applicant furnishes a bond in such amount and with such surety as the court shall approve, conditioned to indemnify the bankrupt for the costs, counsel fees, expenses, and damages occasioned by the appointment and action of the receiver in the event the petition is dismissed or withdrawn. The property of the bankrupt shall be released, however, if he files a counter-bond in such amount and with such surety as the court shall approve, conditioned that the bankrupt account for and turn over such property or pay to the trustee the value thereof in money at the time of release, in the event the adjudication is made.

(*e*) *Appointment after adjudication.*—After adjudication the court may appoint a receiver on application or on its own initiative. Such appointment shall be made only after notice to such persons as the court may designate, unless it clearly appears that notice is impracticable or unnecessary.

(*f*) *Eligibility.*—Only a person who is eligible to be a trustee under Rule 209 (d) may be appointed a receiver.

(*g*) *Order of appointment.*—An order appointing a receiver shall state why the appointment is necessary. A receiver is a mere custodian unless, upon proper cause shown, his duties are enlarged or otherwise specified by order of court. A copy of every order appointing a receiver shall forthwith be delivered to the bankrupt, or mailed to him at his last known address, and to such other persons as the court may designate.

(*h*) *Notice of appointment; qualification.*—The court shall immediately notify the receiver of his appointment, inform him as to how he may qualify, and require him forthwith to notify the court of his acceptance or rejection of the office. A receiver shall qualify as provided in Rule 212.

(*i*) *Duties.*—A receiver shall perform the duties prescribed in Rule 218 to the extent it is appropriate, except as the court may otherwise direct. Forthwith after qualification of the trustee, the receiver shall, unless otherwise ordered, turn over to the trustee all the records and property of the estate in his possession or subject to his control as receiver. The receiver shall file his final report and account within 30 days after qualification of the trustee unless the court otherwise directs.

Rule 202. Appointment of marshal in lieu of receiver; his duties.

The court may appoint a marshal in lieu of a receiver and, in such event, the provisions of Rule 201 except subdivisions (f) and (h) shall apply.

Rule 203. Notices to creditors and the United States.

(*a*) *Ten-day notices to all creditors.*—Except as provided hereinafter, the court shall give all creditors at least 10 days' notice by mail of (1) a meeting of creditors; (2) any proposed sale of property, including the time and place of any public sale, unless the court for cause shown shortens the time or orders a sale without notice; (3) the hearing on the approval of a compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent; (4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 302 (e)(5); (5) the hearing on the dismissal of a case when notice is required by Rule 120 (a); and (6) the hearing on approval of a trustee's or a receiver's account and on an application for compensation or reimbursement of expenses filed by a receiver, marshal, trustee, attorney, or accountant, except when no final meeting of creditors is required to be ordered pursuant to Rule 204 (c). The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold. The notice of a hearing on an application for compensation or reimbursement of expenses shall specify the applicant and the amount requested.

(*b*) *Notice of no dividend.*—If it appears from the schedules that there are no assets from which a dividend can be paid, the court may include in the notice of the first meeting a statement to that effect, that it is unnecessary to file claims, and that if sufficient assets become available for the payment of a dividend, the court will give further notice of the opportunity to file claims and the time allowed therefor.

(*c*) *Other notices to all creditors.*—The court shall give notice by mail to all creditors of (1) the dismissal of the case for failure to pay filing fees pursuant to Rule 120 (b); (2) the entry of an order directing that a chapter case continue as a bankruptcy case as provided in Rule 122 (c); (3) the time allowed for filing claims pursuant to Rule 302 (e)(4) after issuance of a notice of no dividend; (4) the time fixed for filing a complaint objecting to the bankrupt's discharge pursuant to Rule 404 (b); (5) the order of discharge as provided in Rule 404 (h); (6) the waiver, denial, or revocation of a discharge as provided in Rule 408; and (7) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c (2) of the Act as provided in Rule 409 (a)(2).

(*d*) *Notices to creditors whose claims are filed.*—After 6 months following the first date set for the first meeting of creditors, the court may direct that all notices required by subdivision (a) of this rule, except clause (4) thereof, be mailed only to creditors whose claims have been filed and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 302 (e).

(*e*) *Addresses of notices.*—All notices to which a creditor is entitled under these rules shall be addressed to the creditor as he or his duly authorized agent may direct in a request filed with the court; otherwise, to the creditor at the address shown in the schedules or, if a different address is stated in a proof of claim duly filed, then at the address so stated.

(*f*) *Notices to creditors' committee.*—Notwithstanding the foregoing subdivisions, if a creditors' committee has been elected, the court may order that notices required by clauses (2), (3), and (6) of subdivision (a) be mailed only to the committee or to its authorized agent and to creditors who file with the court a request that all notices under these clauses be mailed to them.

(*g*) *Notices to the United States.*—Copies of notices required to be mailed to all creditors under these rules shall be mailed (1) to the district director of internal revenue for the district in which the case is pending and (2) whenever the schedules, the list of creditors, or any other paper filed in the case discloses a debt to the United States other than one for taxes, to the United States attorney for the district in which the case is pending and, if disclosed by the filed papers, to the department, agency, or instrumentality of the United States through which the bankrupt became so indebted.

(*h*) *Notice by publication.*—If the court finds that it is impracticable to give notice to creditors by mail as provided in this rule or that it is desirable to supplement such notice, the court may order publication thereof.

(*i*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 106 and shall also include all names used by the bankrupt within 6 years before the filing of the petition, as disclosed on the statement of affairs filed pursuant to Rule 108.

Rule 204. Meetings of creditors.

(*a*) *First meeting.*

(*1*) *Date and place.*—The first meeting of creditors shall be held not less than 10 nor more than 30 days after the adjudication, but if there is an appeal from or a motion to vacate the adjudication, or if there is a motion to dismiss the case, the court may delay fixing a date for such meeting. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

(*2*) *Agenda.*—The bankruptcy judge shall preside over the transaction of all business at the first meeting of creditors, including the examination of the bankrupt. He shall, when necessary, determine which claims are entitled to vote at the meeting and shall conduct the election of a trustee and, if one is held, the election of a creditors' committee.

(*b*) *Special meetings.*—The court may call a special meeting of creditors on application or on its own initiative.

(*c*) *Final meeting.*—The court shall order a final meeting of creditors in every case in which the net proceeds realized exceed $250 and shall mail a summary of the trustee's final account to the creditors with the notice of the meeting, together with a statement of the amount of the claims allowed. The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate.

Rule 205. Examination.

(*a*) *Examination on application.*—Upon application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless a local rule otherwise provides.

(*b*) *Examination of bankrupt at first meeting.*—At the first meeting of creditors, the court shall publicly examine the bankrupt or cause him to be examined and may permit any party in interest to examine the bankrupt.

(*c*) *Bankruptcy judge to preside.*—The bankruptcy judge shall preside at any examination under subdivision (b) of this rule.

(*d*) *Scope of examination.*—The examination under subdivisions (a) and (b) of this rule may relate only to the acts, conduct, or property of the bankrupt, or to any matter which may affect the administration of the bankrupt's estate, or to his right to discharge.

(*e*) *Compelling attendance for examination and production of documentary evidence.*—The attendance of any person for examination and the production of documentary evidence may be compelled in accordance with the provisions of Rule 916 by the use of a subpoena for a hearing or trial.

(*f*) *Place of examination of bankrupt.*—Without issuing a subpoena, the court may for cause shown and on such terms as it may impose order the bankrupt to be examined under subdivision (a) of this rule at any place it designates, whether within or without the district wherein the case is pending.

(*g*) *Mileage.*—A person other than a bankrupt shall not be required to attend as a witness before a bankruptcy judge unless his lawful mileage and fee for one day's attendance shall be first tendered to him. If the bankrupt resides over 100 miles from the place of examination when he is required to appear for an examination under subdivision (a) of this rule, he shall be tendered mileage allowed by law to a witness for any distance over 100 miles from his residence at the date of bankruptcy or his residence at the time he is required to appear for such examination, whichever is the lesser.

Rule 206. Apprehension and removal of bankrupt to compel attendance for examination.

(*a*) *Order to compel attendance for examination.*—Upon a verified application of any party in interest alleging (1) that the examination of the bankrupt is necessary for the proper administration of the estate and that there is reasonable cause to believe that the bankrupt is about to leave his residence or his principal place of business to avoid examination, or (2) that he has evaded service of a subpoena or of an order to attend for examination, or (3) that he has willfully disobeyed a subpoena or order to attend for examination, duly served upon him, the court may issue to the marshal, or some other officer authorized by law, an order directing him to bring the bankrupt forthwith before the court. If after hearing the court finds the allegations to be true, the court shall thereupon examine the bankrupt or cause him to be examined as soon as possible, but, in any event, the examination shall be commenced within 10 days after he was taken into custody. If it is necessary, the court shall fix conditions for further examination and for the bankrupt's obedience to all orders made in reference thereto.

(*b*) *Removal.*—Whenever any order to bring the bankrupt before the court is issued under this rule and he is found in a district other than that of the court issuing the order, he may be taken into custody under such order and removed in accordance with the following rules:

(1) If taken at a place less than 100 miles from the place of issue of the order, the bankrupt shall be brought forthwith before the court that issued the order.

(2) If taken at a place 100 miles or more from the place of issue of the order, the bankrupt shall be brought without unnecessary delay before the nearest magistrate, referee in bankruptcy, or district judge. If, after hearing, the magistrate, referee, or district judge finds that an order has issued under this rule and that the person in custody is the bankrupt, or if the person in custody waives a hearing, the magistrate, referee, or district judge shall issue an order of removal and the person in custody shall be released on conditions assuring his prompt appearance before the court which issued the order to compel his attendance.

(*c*) *Conditions of release.*—In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of Title 18, U. S. C., § 3146 (a) and (b).

Rule 207. Voting at creditors' meetings.

(*a*) *Right to vote; temporary allowance for voting purposes.*—Except as hereinafter provided, a creditor is entitled to vote at a meeting if he has filed a proof of claim at or before the meeting, unless objection is made or unless the proof of claim is insufficient on its face. Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may temporarily allow it for that purpose in such amount as to the court seems proper.

(*b*) *Majority vote; creditors with claims of $100 or less.*—The trustee and the creditors' committee, if any, shall be elected by a majority vote in number and amount of claims of all creditors who are present and voting in person or by proxy. A claim of $100 or less shall be included in computing the amount, but the holder of such a claim shall not be counted in computing the number of creditors voting.

(*c*) *Creditors with secured or priority claims.*—A creditor holding a claim which is secured or has priority shall be entitled to vote such claim only to the extent the claim exceeds the value of his security or the amount of his priority.

(*d*) *Creditors excluded from voting.*—The following creditors shall not be entitled to vote: a relative or affiliate of the bankrupt; a director or trustee or a stockholder, member, or officer of the bankrupt corporation; a general partner, limited partner, or person in control of the bankrupt partnership; or a person having an interest materially adverse to the estate.

Rule 208. Solicitation and voting of proxies.

(*a*) *Definitions.*

(*1*) *Proxy.*—A proxy includes a power of attorney, proof of claim, or other writing authorizing any person who does not then own a claim to vote the claim or otherwise act as the owner's attorney in fact in connection with the administration of an estate in bankruptcy.

(*2*) *Solicitation of proxy.*—The solicitation of a proxy is any communication, other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent him, by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of the filing of a petition by or against the bankrupt.

(*b*) *Authorized solicitation.*

(1) A proxy may be solicited only by (A) a creditor owning a provable claim against the estate on the date of the filing of the petition; (B) a committee elected under Rule 214; (C) a committee of creditors selected by a majority in number and amount of claims of creditors whose claims are not contingent or unliquidated, who are not disqualified from voting under Rule 207 (c) or (d), and who were present or represented at a meeting of which all creditors having claims of over $500, or the 100 creditors having the largest claims, had at least 5 days' notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had provable claims on the date of the filing of the petition.

(2) A proxy may be solicited only in writing.

(*c*) *Solicitation not authorized.*—This rule shall not be construed to permit solicitation (1) in any interest other than that of general creditors; (2) by or on behalf of any person who has taken charge of property of the bankrupt as a receiver or trustee or an assignee for the benefit of creditors; (3) by or on behalf of any person disqualified from voting under Rule 207 (c) or (d);

(4) by or on behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only.

(*d*) *Data required from holders of multiple proxies.*— At any time before the voting commences at any meeting of creditors held under Rule 204, or at such other time as the court may direct, a holder of 2 or more proxies must file with the court a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances in connection with the execution and delivery of the proxies, including with respect to each of the proxies that was solicited, whether by the proxyholder or by any other person, the following:

(1) a copy of the solicitation;

(2) identification of the solicitor, the forwarder, if he is neither the solicitor nor the owner of the claim, and the proxyholder, including their connections with the bankrupt and with each other, and if the solicitor, forwarder, or proxyholder is an association, a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were members or subscribers in good standing and had provable claims on the date of the filing of the petition, or if the solicitor, forwarder, or proxyholder is a committee of creditors, the date and place the committee was organized, a statement that the committee was organized in accordance with clause (B) or (C) of paragraph (b)(1) of this rule, the members of the committee, the amounts of their claims, when the claims were acquired, the amounts paid therefor, and the extent to which the claims of the committee members are secured or entitled to priority;

(3) a statement that no consideration has been paid or promised by the proxyholder for the proxy;

(4) a statement as to whether there is any agreement, and, if so, the particulars thereof, between the proxyholder and any other person for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any person, other than

a member or regular associate of his law firm, which may be allowed the trustee or any person for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(5) if the proxy was solicited by a person other than the proxyholder, a statement signed and verified by the solicitor that no consideration has been paid or promised by him for the proxy, and a statement signed and verified by him as to whether there is any agreement, and, if so, the particulars thereof, between the solicitor and any other person for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any person, other than a member or regular associate of his law firm which may be allowed the trustee or any person for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(6) if the proxy was forwarded to the holder by a person who is neither a solicitor of the proxy nor the owner of the claim, a statement signed and verified by the forwarder that no consideration has been paid or promised by him for the proxy, and a statement signed and verified by him as to whether there is any agreement between the forwarder and any other person for the payment of any consideration in connection with the voting of the proxy, or for the sharing of compensation with any person, other than a member or regular associate of his law firm, which may be allowed the trustee or any person for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate; and

(7) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member as to the amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on his claim.

(*e*) *Enforcement of restrictions on solicitation.*—The court on its own initiative or on application or motion of any party in interest may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After such hearing as may be appropriate, the court may reject any proxy for cause, vacate any order entered in consequence of the voting of any proxy which should have been rejected, or take any other or further appropriate action.

Rule 209. Selection of trustee.

(*a*) *Election at first meeting.*—The creditors of a bankrupt entitled to vote under Rules 207 and 208 shall elect a trustee at the first meeting, subject to approval by the court and to the provisions of this rule.

(*b*) *Appointment by the court.*—Except as provided in Rule 211, the court shall appoint a trustee if (1) the creditors do not elect a trustee; (2) the trustee elected fails to qualify; (3) a vacancy occurs in the office of trustee; or (4) a trustee is needed in a reopened case. If an elected trustee is disapproved by the court for ineligibility or other good cause, the court may appoint a trustee.

(*c*) *Notice to trustee of his election or appointment; qualification.*—The court shall immediately notify the trustee of his election or appointment. The court shall also inform him as to how he may qualify, including the penal sum of his bond if required, and of the time fixed for the filing of a complaint objecting to the bankrupt's discharge, and shall require him forthwith to notify the court of his acceptance or rejection of the office. A trustee shall qualify as provided in Rule 212.

(*d*) *Eligibility.*—A trustee shall have no interest adverse to the estate and shall be competent to perform the duties of his office. If an individual, he shall have a residence or office in the state in which the case is pending or in any adjacent state, and, if a corporation, it shall be authorized by its charter or by law to act as trustee and have an office in the state in which the case is pending.

Rule 210. Trustees for estates when joint administration ordered.

(*a*) *Election of single trustee for estates being jointly administered.*—If the court orders a joint administration of 2 or more estates pursuant to Rule 117 (b), it may approve election of a single trustee by the creditors of one or more of the bankrupts for the estates being jointly administered.

(*b*) *Right of creditors to elect separate trustee.*—Notwithstanding entry of an order for joint administration pursuant to Rule 117 (b) the creditors of any bankrupt may elect a separate trustee for his estate as provided in Rule 209 (a).

(*c*) *Appointment of trustees for estates being jointly administered.*—If the creditors do not elect a trustee under subdivision (a) or (b) of this rule, the court may appoint one or more trustees for the estates being jointly administered.

(*d*) *Potential conflicts of interest.*—Before approving the election or appointment of one trustee for estates being jointly administered as provided in subdivision (a) or (c) of this rule, the court must be satisfied that the creditors of the different estates will not be prejudiced by conflicts of interest of the trustee.

(*e*) *Trustee for partnership and partners' individual estates.*—Notwithstanding the foregoing provisions of this rule, the trustee of a bankrupt partnership shall also be the trustee of the individual estate of any general partner ordered pursuant to Rule 117 (b) to be administered jointly, unless the court, for cause shown, either (1) permits the creditors of a general partner to elect a separate trustee or (2) appoints a separate trustee for the individual estate.

(*f*) *Separate accounts.*—The trustee or trustees of estates being jointly administered shall nevertheless keep separate accounts of the property and distribution of each estate.

Rule 211. Trustee not appointed in certain cases.

If, after examination of the bankrupt, the court determines that there is no property in the estate other than that which can be claimed as exempt and that no other circumstances indicate the need for a trustee, and if the creditors do not elect a trustee, the court may order that no trustee be appointed. At any time thereafter, for cause shown, a trustee may be appointed by the court.

Rule 212. Qualification by trustee and receiver.

(*a*) *Qualifying bond or security.*—Except as provided hereinafter, every trustee and every receiver shall, before entering upon the performance of his official duties and within 5 days after his election or appointment, qualify by filing a bond in favor of the United States conditioned on the faithful performance of his official duties or by giving such other security as may be approved by the court.

(*b*) *Blanket bond.*—The court may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by a trustee or receiver in more than one case or by more than one trustee or receiver.

(*c*) *Bond excused in certain cases.*—The court may excuse the filing of a bond or the giving of other security (1) by a trustee or receiver when there appears to be an insufficient amount of property in the estate to justify the requirement of a bond or security, or (2) by a receiver when he will not be a custodian of any property.

(*d*) *Qualification by filing acceptance.*—A trustee or receiver for whom a blanket bond has been filed pursuant to subdivision (b) of this rule or who is excused from filing a bond or giving security pursuant to subdivision (c) hereof shall qualify by filing his acceptance of his election or appointment in lieu of the bond.

(*e*) *Amount of bond and sufficiency of surety.*—The court shall determine the amount of the bond and the sufficiency of the surety for each bond filed under this rule.

(*f*) *Filing of bond; proceeding on bond.*—Unless otherwise provided by local rule, a bond given under this rule shall be filed with the referee. A proceeding on the bond of a trustee or receiver may be brought by any party in interest in the name of the United States for the use of the person injured by the breach of the condition. No proceeding shall be brought on a trustee's or receiver's bond more than 2 years after his discharge.

(*g*) *Evidence of qualification.*—A certified copy of the order approving the bond or other security given by a trustee or receiver under subdivision (a) or of his acceptance filed under subdivision (d) of this rule shall constitute conclusive evidence of his qualification.

Rule 213. Limitation on appointment of receivers and trustees.

No standing receiver or trustee may be appointed. Appointments of receivers and trustees by the court shall be apportioned so that the aggregate compensation of any one appointee shall not be excessive.

Rule 214. Creditors' committee.

The creditors entitled to vote for a trustee may, at the first meeting of creditors or at any special meeting called for that purpose, elect a committee of 3 or more creditors. The committee may consult with the trustee in connection with the administration of the estate, make recommendations to the trustee respecting the performance of his duties, and submit to the court any question affecting the administration of the estate.

Rule 215. Employment of attorneys and accountants.

(*a*) *Conditions of employment of attorneys and accountants.*—No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the professional services he is to render, and to the best of the applicant's knowledge all of the attorney's or accountant's connections with the bankrupt, the creditors, or any other party in interest, and their respective attorneys and accountants. If the attorney or accountant represents or holds no interest adverse to the estate in the matters upon which he is to be engaged, and his employment is in the best interest of the estate, the court may authorize his employment. Notwithstanding the foregoing sentence, the court may authorize the employment of an attorney or accountant who has been employed by the bankrupt when such employment is in the best interest of the estate. The employment of any attorney or accountant shall be only for the purposes specified in the order, but the court may authorize a general retainer of an attorney when necessity therefor is shown.

(*b*) *Employment of attorney or accountant with adverse interest.*—If without disclosure any attorney or accountant employed by the trustee or receiver shall represent or hold, or shall have represented or held, any interest adverse to the estate in any matter upon which he is so employed, the court may deny the allowance of any compensation to such attorney or accountant, or the reimbursement of his expenses, or both, and may also deny any allowance to the trustee or receiver if it shall appear that he failed to make diligent inquiry into the connections of such attorney or accountant.

(*c*) *Employment by a general creditor.*—An attorney or accountant shall not be disqualified to act as attorney or accountant for the trustee or the receiver merely because of his employment by a general creditor in the case.

(*d*) *Employment of attorney or accountant on salary.*—A trustee or receiver authorized to operate the business and manage the property of the bankrupt may, without specific authorization under subdivision (a) of this rule, continue or engage any attorney or accountant as a salaried employee if such employment is necessary in the operation of the business and management of the property of the bankrupt.

(*e*) *Employment of trustee or receiver as attorney or accountant.*—The court may authorize the trustee or receiver to act as an attorney or accountant for the estate if such authorization is in the best interest of the estate.

(*f*) *Services rendered by member or associate of firm of attorneys or accountants.*—If, under this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed on behalf of a professional partnership or corporation, any member or regular associate of the firm may act for the attorney or accountant so employed, without further order of the court, and his services may be compensated as services of the attorney or accountant in accordance with Rule 219.

Rule 216. Authorization of trustee to conduct business of bankrupt.

The court may authorize the trustee to conduct the business and manage the property of the bankrupt for such time and on such conditions as may be in the best interest of the estate and consistent with orderly liquidation thereof.

Rule 217. Ancillary proceedings.

(*a*) *Ancillary receivership abolished.*—No ancillary receiver may be appointed in a bankruptcy case. Unless it is inconsistent with the order appointing him, a receiver appointed in a bankruptcy case has capacity to represent the bankrupt estate in any court.

(*b*) *Reference of ancillary proceeding.*—Any complaint, motion, or application for ancillary relief in a court of bankruptcy shall be referred by the clerk of the court in which it is filed to a referee of that court.

Rule 218. Duty of trustee to keep records, make reports, and furnish information.

A trustee shall: (1) within a reasonable time after entering upon his duties file a complete inventory of the property of the bankrupt unless such an inventory has already been filed or unless the court otherwise directs; (2) keep a record of receipts and the disposition of money and property received; (3) furnish information concerning the estate and its administration when reasonably requested by a party in interest, except as otherwise directed by the court; (4) make a written report to the court of the financial condition of the estate and the progress of its administration within a month after his qualification and every 3 months thereafter, unless the court by local rule or order otherwise directs; and (5) file a final report and account containing a detailed statement of receipts and disbursements. If a final meeting of creditors is ordered, the final report and account of the trustee shall be filed at least 15 days before the meeting.

Rule 219. Compensation for services rendered and reimbursement of expenses incurred in a bankruptcy case.

(*a*) *Application for compensation or reimbursement.*—A person seeking compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person on his behalf.

(*b*) *Disclosure of compensation paid or promised to attorney for bankrupt.*—Every attorney for a bankrupt, whether or not he applies for compensation, shall file with the court on or before the first date set for the first meeting of creditors, or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(*c*) *Factors in allowing compensation.*

(*1*) *General.*—The compensation allowable by the court to a trustee, receiver, marshal, attorney, accountant, or other person entitled to compensation for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.

(*2*) *Trustee, receiver, or marshal.*—The compensation allowed by the Act to a trustee, receiver, or marshal shall be in full compensation for the services performed by him as required by the Act and by these rules, but shall not be deemed to cover expenses necessarily incurred in the performance of his duties and allowed upon the settlement of his accounts. Additional compensation may be allowed for legal or other services not required of him by the Act or by these rules, but only if such services were authorized by order of the court before they were rendered.

(*3*) *Attorney or accountant.*—Compensation may be allowed an attorney or an accountant only for professional services.

(*d*) *Restriction on sharing of compensation.*—Except as herein provided, a person rendering services in a bankruptcy case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him from the estate for such services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation as trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney for a bankrupt or for a petitioning creditor from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 220 to which he is a party, or may enter such other order as may be appropriate.

Rule 220. Examination of bankrupt's transactions with his attorney.

(*a*) *Payment or transfer to attorney in contemplation of bankruptcy.*—On motion by any party in interest or on the court's own initiative, the court may examine any payment of money or any transfer of property by the bankrupt, made directly or indirectly and in contemplation of the filing of a petition by or against him, to an attorney for services rendered or to be rendered.

(*b*) *Payment or transfer to attorney, or agreement therefor, after bankruptcy.*—On motion by the bankrupt or on the court's own initiative, the court may examine any payment of money or any transfer of property, or any agreement therefor, by the bankrupt to an attorney after bankruptcy, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the bankruptcy.

(*c*) *Invalidation of unreasonable payment, transfer, or obligation.*—Any payment, transfer, or obligation examined under subdivision (a) or (b) of this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The amount of any excess found to have been paid or transferred under subdivision (a) or (b) may be recovered for the benefit of the estate or the bankrupt, as their interests may appear, and any obligation found to be excessive may be cancelled to the extent of the excess.

Rule 221. Removal of trustee or receiver; substitution of successor.

(*a*) *Removal for cause.*—On application of any party in interest or on the court's own initiative and after hearing on notice, the court may remove a trustee or receiver for cause and appoint a successor.

(*b*) *Substitution of successor.*—When a trustee or receiver dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a bankruptcy case, his successor is automatically substituted as a party in any pending action, proceeding, or matter without abatement.

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS

Rule 301. Proof of claim.

(*a*) *Form and content; who may execute.*—A proof of claim shall consist of a statement in writing setting forth a creditor's claim and, except as provided in Rules 303 and 304, shall be executed by the creditor or by his authorized agent. A proof of claim for wages, salary, or commissions shall conform substantially to Official Form No. 16 or No. 16A; any other proof of claim shall conform substantially to Official Form No. 15.

(*b*) *Evidentiary effect.*—A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Rule 302. Filing proof of claim.

(*a*) *Manner of filing.*—In order for his claim to be allowed, every creditor, including the United States, any state, or any subdivision thereof, must file a proof of claim in accordance with this rule, except as provided in Rules 303 and 304.

(*b*) *Place of filing.*—A proof of claim shall be filed in the place prescribed by Rule 509.

(*c*) *Claim founded on a writing.*—When a claim, or an interest in property of the bankrupt securing the claim, is founded on a writing, the original or a duplicate shall be filed with the proof of claim unless the writing has been lost or destroyed. If lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim. If a security interest in property of the bankrupt is claimed, the proof of claim shall be accompanied by satisfactory evidence that the security interest has been perfected.

(*d*) *Transferred claim.*

(*1*) *Unconditional transfer before proof filed.*—If a claim has been unconditionally transferred before proof of the claim has been filed, the proof of such claim may be filed only by the transferee. If such claim has been transferred after the filing of the petition, it shall be supported by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor or (B) a statement of the transferee why it is impossible to obtain such a statement from the transferor.

(*2*) *Unconditional transfer after proof filed.*—If a claim has been unconditionally transferred after proof thereof has been filed, proof of the terms of the transfer shall be filed, and the court shall immediately notify the original claimant by mail of the filing of such proof of transfer and that objection thereto, if any, must be made within 10 days of the mailing of the notice or within such further time as the court may allow. If the court finds, after hearing if necessary, that the claim has been unconditionally transferred, it shall make an order substituting the transferee for the original claimant. If it does not so find, the court shall make such order as may be appropriate.

(*3*) *Transfer of claim for security before proof filed.*—If a claim has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer and, if the claim was so transferred after the filing of the petition, by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor, or (B) a statement of the transferee why it is impossible to obtain such a statement from the transferor. If either the transferor or the transferee files a proof of claim, the court shall immediately notify the other by mail that he may join in the claim so filed. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. After hearing if necessary, the court shall make such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the administration of the estate as may be appropriate.

(*4*) *Transfer of claim for security after proof filed.*—If a claim has been transferred for security after proof thereof has been filed, proof of the terms of the transfer shall be filed, and the court shall immediately notify the original claimant by mail of the filing of such proof of transfer and that objection thereto, if any, must be made within 10 days of the mailing of the notice or within such further time as the court may allow. After hearing if necessary, the court shall make such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the administration of the estate as may be appropriate.

(*e*) *Time for filing.*—A claim must be filed within 6 months after the first date set for the first meeting of creditors, except as follows:

(1) On application before the expiration of such period and for cause shown, the court may grant a reasonable, fixed extension of time for the filing of a claim by the United States, a state, or a subdivision thereof.

(2) In the interest of justice the court may grant an infant or incompetent person without a guardian up to an additional 6 months for filing a claim.

(3) A claim which arises in favor of a person or becomes allowable because of a judgment for the recovery of money or property from such person or because of a

judgment denying or avoiding a person's interest in property may be filed within 30 days after such judgment becomes final, but if the judgment imposes a liability which is not satisfied, or a duty which is not performed, within such period or such further time as the court may permit, the claim shall not be allowed.

(4) If notice of no dividend was given to creditors pursuant to Rule 203 (b), and subsequently the payment of a dividend appears possible, the court shall notify the creditors of that fact and shall grant them a reasonable, fixed time for filing their claims of not less than 60 days after the mailing of the notice or 6 months after the first date set for the first meeting of creditors, whichever is the later.

(5) If all claims allowed have been paid in full, the court may grant a reasonable, fixed extension of time for the filing of claims not filed within the time hereinabove prescribed against any remaining surplus.

Rule 303. Filing of tax and wage claims by bankrupt.

If a creditor having a provable claim for taxes or wages fails to file his claim on or before the first date set for the first meeting of creditors, the bankrupt may execute and file a proof of such claim in the name of the creditor. Such claim shall be treated as a filed claim only for purposes of allowance and distribution. The court shall forthwith mail notice of such filing to the creditor and to the trustee. The creditor may nonetheless file a proof of claim pursuant to Rule 302 which proof when filed shall supersede the proof filed by the bankrupt.

Rule 304. Claim by codebtor.

A person who is or may be liable with the bankrupt, or who has secured a creditor of the bankrupt, may, if the creditor fails to file his claim on or before the first date set for the first meeting of creditors, file a proof of claim pursuant to Rule 302 in the name of the creditor, if known, or, if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of the distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 302, and such proof of claim shall supersede the proof of claim filed pursuant to the first sentence of this rule.

Rule 305. Withdrawal of claim.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding or the creditor participates significantly in the case or receives a dividend, he may not withdraw the claim save on application or motion, with notice to the trustee or receiver, and on order of the court containing such terms and conditions as the court deems proper.

Rule 306. Objections to and allowance of claims for purpose of distribution; valuation of security.

(*a*) *Trustee's duty to examine and object to claims.*—The trustee shall examine proofs of claim and object to the allowance of improper claims, unless no purpose would be served thereby.

(*b*) *Allowance when no objection made.*—Subject to the provisions of subdivision (d) of this rule, a claim filed in accordance with Rule 302, 303, or 304 shall be deemed allowed for the purpose of distribution unless objection is made by a party in interest.

(*c*) *Objection to allowance.*—An objection to the allowance of a claim for the purpose of distribution shall be in writing. A copy of the objection and notice of a hearing thereon shall be mailed or delivered to the claimant. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 701, the proceeding thereby becomes an adversary proceeding.

(*d*) *Secured claims.*—If a secured creditor files a proof of claim, the value of the security interest held by him as collateral for his claim shall be determined by the court, and the claim shall be allowed only to the extent it is enforceable for any excess of the claim over such value.

Rule 307. Reconsideration of claims.

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. If the motion is granted, the court may after hearing on notice make such further order as may be appropriate.

Rule 308. Declaration and payment of dividends.

Dividends to creditors shall be paid as promptly as practicable in such amounts and at such times as the court may order. Dividend checks shall be made payable and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Rule 910. In that event, unless a local rule or court order provides otherwise, dividend checks shall be made payable to the creditor and to such other person and shall be mailed to such other person.

Rule 309. Small dividends.

The court may by local rule or order direct that no dividend for less than $1 shall be distributed by the trustee to any creditor. Any such dividend shall be treated in the same manner as unclaimed funds as provided in Rule 310.

Rule 310. Unclaimed funds.

Sixty days after the distribution of the final dividend, the trustee shall stop payment of all checks then unpaid and file with the clerk of the district court a list of the names and addresses, so far as known, of the persons entitled to such payments and the amounts thereof. The unclaimed funds shall thereupon be deposited in the registry of the United States district court and shall be withdrawn as provided in Title 28, U. S. C., § 2042.

PART. IV. THE BANKRUPT: DUTIES AND BENEFITS

Rule 401. Petition as automatic stay of certain actions on unsecured debts.

(*a*) *Stay of actions.*—The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17a of the Act.

(*b*) *Duration of stay.*—Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, or modified by the bankruptcy court under subdivision (d) or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or the bankrupt is denied a discharge or waives or otherwise loses his right thereto.

(*c*) *Annulment of stay.*—At the expiration of 30 days after the first date set for the first meeting of creditors, the stay provided by this rule shall be deemed annulled as against any creditor whose debt has not been duly scheduled and who has not filed his claim by that time.

(*d*) *Relief from stay.*—On the filing of a complaint by a creditor seeking relief from a stay provided by this rule, the bankruptcy court shall set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay.

(*e*) *Availability of other relief.*—Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 402. Duties of bankrupt.

In addition to performing other duties prescribed by these rules, the bankrupt shall (1) attend and submit to an examination at the first meeting of creditors and at such other times as ordered by the court; (2) attend at the hearing on a complaint objecting to his discharge and, if called as a witness, testify with respect to the issues raised; (3) if he has not yet filed a schedule of property pursuant to Rule 108, immediately inform the receiver or, if no receiver is appointed, the trustee, in writing, as to the location of real property in which he has an interest and the name and address of every person holding money or property subject to his withdrawal or order; (4) if the court directs, file a statement of the executory contracts, including unexpired leases, to which he is a party; (5) cooperate with the receiver, if any, and the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and (6) comply with all orders of the court.

Rule 403. Exemptions.

(*a*) *Claim of exemptions.*—A bankrupt shall claim his exemptions in the schedule of his property required to be filed by Rule 108.

(*b*) *Trustee's report.*—The trustee shall examine the bankrupt's claim for exemptions, set apart such as are lawfully claimed and allowable, and report to the court the items set apart, the amount or estimated value of each, and the exemptions claimed that are not allowable. The report shall be filed with the court no later than 15 days after the trustee qualifies. If the trustee reports that any exemption claimed is not allowable, he shall forthwith mail or deliver copies of the report to the bankrupt and his attorney.

(*c*) *Objections to report.*—Any creditor or the bankrupt may file objections to the report within 15 days after its filing, unless further time is granted by the court within such 15-day period. Copies of the objections so filed shall be delivered or mailed to the trustee and, if the objections are by a creditor, to the bankrupt and his attorney. After hearing upon notice the court shall determine the issues presented by the objections. The burden of proof shall be on the objector.

(*d*) *Procedure if no trustee qualified.*—If no trustee has qualified, the bankruptcy judge shall file the report prescribed by subdivision (b) of this rule within 15 days after the first date set for the first meeting of creditors. If the bankrupt files objections to the report, the court shall appoint a trustee or receiver, who shall represent the estate in the hearing on the objections.

(*e*) *Approval of report if no objections.*—If no objections are filed within the time provided by this rule, the report shall be deemed approved by the court. On request, the court may, at any time and without reopening the case, enter an order approving the report.

(*f*) *Claim of exemption by person other than bankrupt.*—If the bankrupt fails to claim the exemptions to which he is entitled, or if he dies before his exemptions have been set apart to him, his spouse, dependent children, or any other persons who are entitled to claim the exemptions allowable to the bankrupt may, within such time as the court may order, file a claim for his exemptions or object to the report.

Rule 404. Grant or denial of discharge.

(*a*) *Time for filing complaint objecting to discharge.*—The court shall make an order fixing a time for the filing of a complaint objecting to the bankrupt's discharge under § 14c of the Act. The time shall be not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors, except that if notice of no dividend is given pursuant to Rule 203 (b), the court may fix such time as early as the first date set for the first meeting of creditors.

(*b*) *Notice.*—The court shall give at least 30 days' notice of the time fixed for filing a complaint objecting to the bankrupt's discharge under § 14c of the Act except that only 10 days' notice is required if notice of no dividend is given under Rule 203 (b). Such notice shall be given to all creditors in the manner provided in Rule 203, and to the trustee and his attorney, if any, to their respective addresses as filed with the court.

(*c*) *Extension of time.*—The court may for cause, on its own initiative or on application of any party in interest, extend the time for filing a complaint objecting to discharge.

(*d*) *Grant of discharge.*—On expiration of the time fixed for filing a complaint objecting to discharge, the court shall forthwith grant the discharge unless (1) a complaint objecting to the discharge has been filed, (2) the bankrupt has filed a waiver under Rule 405, (3) it appears that the bankrupt has failed to attend and submit himself to examination at the first meeting of creditors or at any meeting specially called for his examination, or (4) the prescribed filing fees have not been paid in full.

(*e*) *Applicability of rules in Part VII.*—A proceeding commenced by a complaint objecting to discharge is governed by the rules in Part VII.

(*f*) *Order of discharge.*—An order of discharge shall conform substantially to Official Form No. 24.

(*g*) *Registration in other districts.*—An order of discharge that has become final may be registered in any other district by filing in the office of the clerk of the district court of that district a certified copy of the order and when so registered shall have the same effect as an order of the court of the district where registered and may be enforced in like manner.

(*h*) *Notice of discharge.*—Within 45 days after an order of discharge becomes final, the court shall mail a copy of such order to the persons specified in subdivision (b) of this rule.

Rule 405. Waiver of discharge.

Any bankrupt may waive his right to discharge by a writing filed with the court.

Rule 406. Implied waiver of discharge.

If the bankrupt fails to attend and submit himself to examination at the first meeting of creditors, at any meeting specially called for his examination, or at the trial on a complaint objecting to his discharge, the court on motion shall, or on its own initiative may, set a time for hearing to determine whether the bankrupt shall be deemed to have waived his right to a discharge. Notice of the hearing shall be given the bankrupt and such other parties in interest as the court may designate.

Rule 407. Burden of proof in objecting to discharge.

At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the facts essential to his objection.

Rule 408. Notice of nondischarge.

If a waiver of discharge is filed, or if an order is entered denying or revoking a discharge or deeming the right thereto to have been waived, the court shall, within 30 days after the filing of the waiver or the entry of the order, give notice thereof to all creditors in the manner provided in Rule 203.

Rule 409. Determination of dischargeability of a debt; judgment on nondischargeable debt; jury trial.

(*a*) *Proceeding to determine dischargeability.*

(*1*) *Persons entitled to file complaint; time for filing in ordinary case.*—A bankrupt or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt. Except as provided in paragraph (2) of this subdivision, the complaint may be filed at any time, and a case may be reopened without the payment of an additional filing fee for the purpose of filing a complaint under this rule.

(*2*) *Time for filing complaint under* § *17c* (*2*) *of the act; notice of time fixed.*—The court shall make an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c (2) of the Act. The time shall be not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors, except that if notice of no dividend is given pursuant to Rule 203 (b), the court may fix such time as early as the first date set for the first meeting of creditors. The court shall give creditors at least 30 days' notice of the time so fixed except that only 10 days' notice is required if notice of no dividend is given under Rule 203 (b). Such notice shall be given to all creditors in the manner provided in Rule 203. The court may for cause, on its own initiative or on application of any party in interest, extend the time fixed under this paragraph.

(*b*) *Claim and demand for judgment on nondischargeable debt.*—If his claim has not yet been reduced to judgment, the creditor shall include in a complaint or answer filed under subdivision (a) of this rule a statement of his claim and demand for judgment on the debt as provided in § 17c (3) of the Act.

(*c*) *Jury trial.*—Either party may demand a trial by jury of any issue triable of right by a jury by serving on the other party and filing a demand therefor in writing at any time after the filing of a complaint under this rule and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed on a pleading of the party. In his demand the party shall specify the issues which he wishes to be so tried. If he has demanded trial by jury for only some of the issues so triable of right, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other issues so triable of right in the proceeding.

The trial of an issue for which a jury trial has been demanded shall be placed on the jury calendar of the district court when it is ready for trial unless (1) the bankruptcy judge determines after hearing on notice that the issue is not triable of right by a jury or (2) a local rule of court provides otherwise. Issues not triable of right by a jury may be tried by the bankruptcy judge, and motions and applications in the proceeding other than those necessarily incidental to and made during the course of the jury trial may be determined by the bankruptcy judge. The failure of a party to serve and file a demand in accordance with this rule constitutes a waiver by him of trial by jury. Rules 47–51 of the Federal Rules of Civil Procedure apply to a jury trial under this sudivision.

(*d*) *Applicability of rules in Part VII.*—A proceeding commenced by a complaint filed under this rule is governed by the rules in Part VII.

PART V. COURTS OF BANKRUPTCY; OFFICERS AND PERSONNEL; THEIR DUTIES

Rule 501. Courts of bankruptcy and referees' offices.

(*a*) *Courts of bankruptcy always open.*—The court of bankruptcy shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(*b*) *Meetings and hearings; orders in chambers.*—All meetings of creditors and hearings shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a bankruptcy judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

(*c*) *Referee's office.*—The referee's principal office with a clerical assistant in attendance shall be open during business hours on all days except Saturdays, Sundays, and the legal holidays as listed in Rule 6 (a) of the Federal Rules of Civil Procedure, but a local rule or order may provide that the referee's office shall be open for specified hours on Saturdays or particular legal holidays other than those listed in Rule 77 (c) of the Federal Rules of Civil Procedure.

Rule 502. Referees' bonds not required.

A referee shall not be required to file a bond in order to qualify.

Rule 503. Restrictions on referees.

A referee shall not engage in any transaction, directly or indirectly, with the estate and shall not act as trustee or receiver in any case under the Act. An active full-time referee shall not engage in the practice of law, and an active part-time referee shall not act as attorney for any party in any case under the Act.

Rule 504. Books, records, and reports of referees.

(*a*) *Records to be kept; reports to be made.*—The referee shall keep a docket for each case referred to him and shall keep a list of claims filed against the estate in each case in which it appears there will be a distribution to unsecured creditors after payment of the costs and expenses of administration. He shall keep such other books and records and make such reports as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. All papers filed with the referee, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the referee's docket. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process.

(*b*) *Disposition of papers of closed cases.*—When a case is closed, the referee shall transmit all papers pertaining thereto to the clerk of the district court.

Rule 505. Nepotism, influence, and interest.

(*a*) *Appointment or employment of relative of or person connected with judge or referee.*—No person may be appointed as trustee, receiver, marshal, or appraiser or employed as accountant or auctioneer in a bankruptcy case (1) if he is a relative of any judge or referee of the court making the appointment or authorizing the employment, or (2) if he is so connected with any judge or referee of the court making the appointment or authorizing the employment as to render such appointment or employment improper.

(*b*) *Disqualification of judge or referee from acting in case: relationship to party or attorney; interest in case; appearance of influence.*—Any judge or referee shall disqualify himself in any bankruptcy case (1) in which he is a relative of any party or his attorney, has a substantial, direct or indirect interest, has been of counsel, or is or has been a material witness, or (2) if his acting therein would justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position, or influence of any party or other person.

(*c*) *Disqualification of judge or referee from authorizing employment of attorney.*—Any judge or referee shall disqualify himself from authorizing the employment and from determining the compensation of (1) a relative as an attorney in a bankruptcy case, or (2) an attorney in a bankruptcy case if the judge or referee is so connected with the attorney as to render it improper for him to authorize such employment.

Rule 506. Delegation of ministerial functions.

The referee may delegate any ministerial function to an assistant employed in his office or, with the approval of the chief judge of the district court, to any person employed in the office of the clerk of the district court.

Rule 507. Books and records kept by clerks.

(*a*) *Bankruptcy docket.*—The clerk of the district court shall keep a book known as the "bankruptcy docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States and shall enter therein each bankruptcy case.

(*b*) *Transmission of papers.*—The clerk shall transmit to the referee all papers which pertain to every case referred to him, unless the judge otherwise directs.

(*c*) *Index of cases; certificate of search.*—The clerk shall keep an index of all cases under the Act filed in or transferred to the court and of all discharges granted by the court. On request, the clerk shall make a search of the index and papers in his custody and issue a certificate as to whether a case has been filed in or transferred to the court or a discharge entered in its records.

(*d*) *Public access.*—The docket and index kept by the clerk under this rule shall be open to examination by any person without charge.

(*e*) *Other books and records of the clerk.*—The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

Rule 508. Public access to records and papers in bankruptcy cases.

Subject to the provisions of Rule 918, all papers filed in a bankruptcy case, the referee's docket, and the list of claims, if any, are public records and shall be open to examination by any person at reasonable times without charge.

Rule 509. Filing of papers.

(*a*) *Place of filing.*—A petition commencing a bankruptcy case shall be filed with the clerk of the district court. After reference, all papers, including a petition filed in a pending case and proofs of claim, shall be filed with the referee unless otherwise directed by local rule or by order of the judge.

(*b*) *Notation of time of filing.*—The clerk of the district court shall note on the petition the date and hour of its filing, and the clerk or the referee shall note the date of its filing on each paper thereafter filed with him.

(*c*) *Error in filing.*—A paper intended to be filed but erroneously delivered to the trustee or receiver, or the attorney for either of them, or to the district judge, referee, or clerk of the district court, shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the proper person. In the interest of justice, the court may order that the paper shall be deemed filed as of the date of its original delivery.

Rule 510. Issuance and certification of copies of papers.

On request, the referee or the clerk of the district court shall issue a certified copy of the record of any proceeding in a bankruptcy case or of any paper filed with the court.

Rule 511. Recording and reporting of proceedings.

(*a*) *Record of proceedings.*—Whenever practicable, the court shall require a record to be made of all proceedings in bankruptcy cases. The record may be taken by sound recording or by a reporter employed on authorization of the court to take a verbatim record by shorthand or other means. The expense of making the record shall be a charge against the estate unless the court assesses the cost or a part thereof against a person who asserts a vexatious or frivolous claim or defense. The reporter or operator of a recording device shall attach his certificate to the original shorthand notes or other original records taken under this rule and promptly file them with the court for retention for at least 6 months and as long thereafter as the court directs.

(*b*) *Transcripts of proceedings.*—Upon the request of any person, including the United States, who has agreed to pay the fee therefor, or of the bankruptcy judge, the reporter or a typist shall promptly transcribe the original records of the requested parts of a proceeding and deliver the transcript, certified by him, to the person making the request. A certified copy of any transcript so made shall be promptly filed with the court by the person making the transcript. The fees for transcripts shall be charged at rates prescribed by the court but in no event shall a separate fee be charged for the copy filed with the court pursuant to the preceding sentence. The cost of transcription shall be a charge against the estate only when approved by the court.

(*c*) *Admissibility of record in evidence.*—When properly certified, a sound recording or a transcript of a proceeding shall be admissible evidence to establish the record thereof and shall be deemed prima facie a correct statement of the testimony taken and the proceedings had.

Rule 512. Designated depositories.

(*a*) *Designation.*—The referees shall designate by order banking institutions as depositories for the money of estates. Each depository so designated shall give security in accordance with subdivision (b) of this rule for the prompt repayment of deposits made therein. The referees may from time to time change the number of depositories, the designations, or the amount of security required. Except as provided in the last sentence of subdivision (b), the authority of referees under this rule shall be exercised by a majority vote.

(*b*) *Security required.*—Except as provided hereinafter, the referees shall require from each designated depository a bond secured by the undertaking of an authorized corporate surety approved by them, or by the deposit of securities designated in Title 6, U. S. C., § 15. Securities accepted for deposit in lieu of a surety upon a depository bond shall be deposited by the depository bank in the custody of a Federal Reserve bank or branch thereof designated by the referees and shall be subject to the order of the referees. No bond or other security shall be required for any deposits fully insured under Title 12, U. S. C., § 1821, and any referee may designate a banking institution for the purpose of receiving deposits so insured.

(*c*) *Prohibition of deposits when adequacy of security doubtful.*—No trustee or receiver or other person shall deposit in any depository money received or held by him as a fiduciary under the Act if he has reasonable cause to believe that the bond or the security therefor is or may be inadequate in view of existing and expected deposits.

(*d*) *Condition of bond; place of filing; proceeding on bond.*—The condition of a bond given under this rule shall be that the designated banking institution will well and truly account for all money deposited with it as depository and for all interest payable on savings and time deposits when duly authorized, will pay out such money and interest only in accordance with the Act, these rules, and rules and orders of the court, and will otherwise faithfully perform all its duties as depository. A bond given under this rule shall be filed with the court and may be proceeded upon in the name of the United States for the use of any person injured by a breach of the condition.

(*e*) *New bond: When required.*—The referees shall require a depository to give a new bond whenever the prior bond, together with securities deposited pursuant to subdivision (b), does not appear to constitute adequate security in view of existing and expected deposits.

(*f*) *Revocation of designation.*—If any depository fails, within the time fixed, to give a bond under this rule or to deposit securities adequate for existing and expected deposits, the referees shall order the depository immediately to pay over all money on deposit with it, with all interest payable thereon, and shall revoke its designation.

(*g*) *Relief from liability on bond.*—A surety on the bond of a depository may, by an application setting forth the grounds therefor, request to be relieved from liability with respect to any subsequent default of the depository. If, after hearing upon notice to the depository, other sureties, trustees, and other representatives of estates having money in the depository, the referees determine that the application can be granted without injury to any party in interest, the applicant shall be relieved and a new bond or other appropriate security shall be required.

(*h*) *Reports required of designated depositories.*—The Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States shall prescribe by regulation the reports to be made by designated depositories.

Rule 513. Special masters.

If a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply.

Rule 514. Closing cases.

Whenever it appears that an estate has been administered and the court has passed upon the final account and discharged the trustee, the case shall be closed.

Rule 515. Reopening cases.

A case may be reopened on application by the bankrupt or other person to administer assets, to accord relief to the bankrupt, or for other good cause. The application shall be filed with the clerk of the district court having custody of the papers in the case. The case shall be referred forthwith for action on the application and for further proceedings therein.

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 601. Petition as automatic stay against lien enforcement.

(*a*) *Stay against lien enforcement.*—The filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings.

(*b*) *Duration of stay.*—Except as it may be terminated, annulled, or modified by the bankruptcy court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or closed, or until the property subject to the lien is, with the approval of the court, set apart as exempt, abandoned, or transferred.

(*c*) *Relief from stay.*—On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(*d*) *Ex parte relief from stay.*—On the filing of a complaint seeking relief from a stay provided by this rule, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee or receiver or, if none has qualified, to the petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(*e*) *Availability of other relief.*—Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 602. Duty of trustee or receiver to give notice of bankruptcy.

(*a*) *Real property.*—As soon as possible after his qualification a receiver shall record a certified copy of the petition without schedules or of the order of adjudication, if any, in the office where transfers of real property are recorded in every county where the bankrupt has an interest in real property not exempt from execution. If a certified copy of the petition or order of adjudication has not previously been recorded in an office where recordation is required by the preceding sentence, the trustee shall as soon as possible after his qualification record in every such office a certified copy of the petition without schedules or of the order of adjudication, if any, or of the order approving his bond. The recording of a copy pursuant to this subdivision is not necessary, however, in the county in which is kept the record of the original proceedings in the case or in any office where such a copy has previously been recorded.

(*b*) *Personal property.*—As soon as possible after his qualification a receiver or, if a receiver has not done so, the trustee shall give notice of the bankruptcy to every person known to be holding money or property subject to withdrawal or order of the bankrupt including every bank, building and loan association, public utility company, and landlord with whom the bankrupt has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the bankrupt. No notice need be given, however, to any of the forenamed persons who has knowledge or has previously been notified of the bankruptcy, and no notice need be given with respect to property exempt from execution.

Rule 603. Burden of proof as to validity of post-bankruptcy transfer.

Any person asserting the validity of a transfer under § 70d of the Act shall have the burden of proof.

Rule 604. Accounting by prior custodian of property of the estate.

(*a*) *Accounting required.*—Any receiver or trustee appointed in proceedings not under the Act, assignee for the benefit of creditors, or agent, required by the Act to deliver property in his possession or control to the trustee or receiver in bankruptcy, shall promptly file a written report and account with the bankruptcy court with respect to the property of the estate and his administration thereof.

(*b*) *Examination of administration.*—On the filing of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, the court shall determine the propriety of such administration, including the reasonableness of all disbursements.

Rule 605. Money of the estate: Collection, deposit, and disbursement.

(*a*) *Collection of estate; conversion to money.*—A trustee shall collect the property of the estate and, with the approval of the court, convert it to money.

(*b*) *Deposits; interest.*—The trustee shall deposit all money received by him in a designated depository, either in a checking account or, if authorized by the court, in an interest-bearing account or deposit.

(*c*) *Withdrawals and disbursements.*—The trustee shall withdraw and disburse money of the estate only by check or other method approved by the court.

Rule 606. Appraisal and sale of property; compensation and eligibility of appraisers and auctioneers.

(*a*) *Appraiser: Appointment and duties.*—The court shall appoint one or more competent and disinterested appraisers, unless it determines that such appointment is unnecessary. Unless the court directs otherwise, the appraiser or appraisers shall appraise all the property of the estate and shall prepare and file a report of the appraisal with the court.

(*b*) *Conduct of sale.*

(*1*) *Court approval.*—The property of the estate shall be sold subject to the approval of the court unless the court orders otherwise.

(*2*) *Public or private sale.*—All sales shall be by public auction, unless otherwise ordered by the court on application to the court and for good cause shown. Unless it is impracticable, there shall be filed with the court on completion of a sale an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk. If the property is sold by an auctioneer, he shall file the statement and furnish a copy to the trustee or receiver; otherwise the trustee or receiver shall file the statement.

(*3*) *Sale free of lien or other interest.*—A proceeding to sell property free of a lien, or of any other interest for which the holder can be compelled to take a money satisfaction, is governed by the rules in Part VII.

(*4*) *Execution of instruments.*—After a sale in accordance with this subdivision the trustee or receiver, as the case may be, shall execute such instruments as may be necessary or ordered by the court to effectuate the transfer to the purchaser.

(*c*) *Compensation and eligibility of auctioneers and appraisers.*—No auctioneer shall be employed or appraiser appointed except upon an order of the court fixing the amount or rate of compensation. No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as an auctioneer or appraiser. No residence or licensing requirement shall apply to an auctioneer employed or appraiser appointed under this rule.

Rule 607. Assumption, rejection, and assignment of executory contracts.

Within 30 days after the qualification of the trustee, unless the court for cause shown extends or reduces the time, the trustee shall file a statement showing any executory contracts of the bankrupt, including unexpired leases, which the trustee has assumed. Whenever practicable, the trustee shall obtain approval of the court before he assumes a contract. Any such contract not assumed within 60 days after the qualification of the trustee, or within such further or reduced time as the court may allow within such 60-day period, shall be deemed to be rejected. If a trustee does not qualify, any such contract shall be deemed to be rejected at the expiration of 60 days after the date of an order directing that a trustee be not appointed, or at such earlier or later time as the court may fix within such 60-day period. On application by the trustee for authority to assign any contract he has assumed pursuant to this rule, the court shall determine the matter after hearing on notice to the other party to the contract.

Rule 608. Abandonment of property.

The court may, on application or on its own initiative and after hearing on such notice as it may direct, approve the abandonment of any property and, without reopening the case, may direct the abandonment of any property of inconsequential value discovered after a case is closed. If a case is closed without administration of property of the estate that has been scheduled, the property shall be deemed to have been abandoned with the approval of the court, and on request the court may, without reopening the case, enter an order approving the abandonment.

Rule 609. Redemption of property from lien or sale.

On application by the trustee and after hearing on such notice as the court may direct, the court may authorize the redemption of property from a lien or from a sale to enforce a lien in accordance with applicable law.

Rule 610. Prosecution and defense of proceedings by trustee or receiver.

The trustee or receiver may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the bankrupt, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal.

Rule 611. Preservation of voidable transfer.

Whenever any transfer is voidable by the trustee, the court may determine, in an adversary proceeding in which are joined persons claiming interests or rights in the property subject to the transfer, whether the transfer shall be avoided only or shall be preserved for the benefit of the estate.

Rule 612. Proceeding to avoid indemnifying lien or transfer to surety.

If a lien voidable under § 67a of the Act has been dissolved by the furnishing of a bond or other obligation and the surety thereon has been indemnified by the transfer of, or the creation of a lien upon, nonexempt property of the bankrupt, the surety shall be joined as a defendant in any proceeding to avoid the indemnifying transfer or lien. Such proceeding is governed by the rules in Part VII. If an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court on motion by any party in interest, shall ascertain the value of such property or lien; if such value is less than the amount for which such property or lien is indemnity, the surety may elect to retain the property or lien on payment of the value so ascertained to the trustee or debtor, as the case may be, within such time as the court shall fix.

PART VII. ADVERSARY PROCEEDINGS

Rule 701. Scope of rules of Part VII.

The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

Rule 703. Commencement of adversary proceeding.

An adversary proceeding is commenced by filing a complaint with the court.

Rule 704. Process; service of summons, complaint, and notice of trial.

(*a*) *Summons and notice of trial: Issuance and form; service with complaint.*—Upon the commencement of an adversary proceeding the bankruptcy judge shall set a date for trial and shall forthwith issue a summons and notice of trial. The summons and notice shall conform substantially to Official Form No. 26 and shall be served together with the complaint on the defendant in one of the modes authorized by this rule.

(*b*) *Personal service.*—Service of the summons, complaint, and notice of trial may be made as provided in Rule 4 (d) of the Federal Rules of Civil Procedure for the service of process. Personal service may be made by any person not less than 18 years of age who is not a party.

(*c*) *Service by mail.*—Service of summons, complaint, and notice of trial may also be made by any form of mail requiring a signed receipt as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons, complaint, and notice to his dwelling house or usual place of abode or to the place where he regularly conducts his business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons, complaint, and notice to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons, complaint, and notice in such case shall be addressed to the person required to be served at his dwelling house or usual place of abode or at the place where he regularly conducts his business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons, complaint, and notice directed to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons, complaint, and notice to the United States attorney for the district in which the action is brought and also to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons, complaint, and notice to such officer or agency.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons, complaint, and notice to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons, complaint, and notice to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons, complaint, and notice is mailed to the person upon whom service is prescribed to be served by any statute of the United States

or by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons, complaint, and notice is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at his dwelling house or usual place of abode or at the place where he regularly carries on his business or profession and, if the authorization so requires, by mailing also a copy of the summons, complaint, and notice to the defendant as provided in this subdivision.

(*d*) *Service pursuant to court order.*

(*1*) *Service in accordance with Federal Rule of Civil Procedure 4 (e).*—If a party cannot be served as provided in subdivision (b), (c), or (i) of this rule, the court may order the summons, complaint, and notice of trial to be served as provided in Rule **4** (e) of the Federal Rules of Civil Procedure for service of summons, notice, or order in lieu of summons.

(*2*) *Service by publication.*—If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in subdivision (b), (c), or (i) of this rule, the court may order the summons, complaint, and notice of trial to be served by mailing copies thereof to the party's last known address, if any, and by at least one publication in such manner and form as the court may direct.

(*e*) *Time of service.*—Service under subdivision (b) shall be made within 3 days after the issuance of the summons. If service is made under subdivision (c), the summons, complaint, and notice of trial shall be deposited in the mail within 3 days after the issuance of the summons. Service under subdivision (d) or (i) shall be made within the time fixed by the court. If a summons is not timely served in accordance with the foregoing provisions, another summons shall be issued and served and a new date set for trial.

(*f*) *Territorial limits of effective service.*

(1) The summons, together with the complaint and notice of trial, and all other process except a subpoena may be served anywhere within the United States. "United States," as used in this subdivision, includes the Commonwealth of Puerto Rico and the territories and possessions to which the Act is or may hereafter be applicable.

(2) The summons, together with the complaint and notice of trial, and all other process except a subpoena may be served in a foreign country (A) on the bankrupt, any person required to perform the duties of a bankrupt, any general partner of an adjudicated partnership, or any attorney who is a party to a transaction subject to examination under Rule 220, or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court, or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4 (d)(7) or Rule 4 (e) of the Federal Rules of Civil Procedure.

(3) A subpoena may be served within the territorial limits provided in Rule 45 of the Federal Rules of Civil Procedure.

(*g*) *Proof of service.*—Service of process under the foregoing provisions of this rule shall be proved as provided in Rule 4 (g) of the Federal Rules of Civil Procedure. When service is made by mail, the proof shall include the signed receipt or other evidence satisfactory to the court that delivery was made to the addressee or that acceptance was refused by the addressee. Failure to make proof of service does not affect the validity of the service.

(*h*) *Effect of errors; amendment.*—Service of process under this rule shall be effective notwithstanding an error in the papers served or the manner or proof of service if no material prejudice resulted therefrom to the substantial rights of the party against whom the process issued. Amendment of process or proof of service thereof may be allowed as provided in Rule 4 (h) of the Federal Rules of Civil Procedure.

(*i*) *Alternative provisions for service in a foreign country.*—If service of the summons, complaint, and notice of trial or of any process is authorized to be effected upon a party in a foreign country, it may also be made and proved as provided in subdivision (i) of Rule 4 of the Federal Rules of Civil Procedure.

Rule 705. Service and filing of pleadings and other papers.

(*a*) *Service.*—Subdivisions (a), (b), and (c) of Rule 5 of the Federal Rules of Civil Procedure apply in adversary proceedings, but when service of pleadings on parties in default is required by subdivision (a) of that rule, service shall be made in the manner provided for service of summons in Rule 704.

(*b*) *Filing.*—All papers after the complaint required to be served upon a party shall be filed with the court not later than the second business day following service.

Rule 707. Pleadings allowed.

Rule 7 (a) of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 708. General rules of pleading.

Rule 8 of the Federal Rules of Civil Procedure, except clause (1) of subdivision (a) thereof, applies in adversary proceedings. All statements in pleadings shall be made subject to the obligations set forth in Rule 911 (a).

Rule 709. Pleading special matters.

Rule 9 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 710. Form of pleadings.

Rule 10 of the Federal Rules of Civil Procedure applies in adversary proceedings, except that the caption of each pleading in such a proceeding shall conform substantially to Official Form No. 25.

Rule 712. Defenses and objections.

(*a*) *When presented.*—If a complaint is duly served upon him, a defendant shall serve his answer within 25 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 10 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 10 days after service of the answer or, if a reply is ordered by the court, within 10 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 30 days after the issuance of the summons, and shall serve an answer to a cross-claim, or a reply to a counterclaim, within 30 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 5 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 5 days after the service of a more definite statement.

(*b*) *Applicability of Federal Rule of Civil Procedure 12* (*b*)–(*h*).—Subdivisions (b)–(h) of Rule 12 of the Federal Rules of Civil Procedure apply in adversary proceedings, except that:

(1) if an order granting a motion for a more

definite statement is not obeyed within 5 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just;

(2) a motion made by a party under subdivision (f) to strike a pleading to which no responsive pleading is permitted by these rules must be made within 10 days after service of the pleading upon the party;

(3) the references to Rules 15 (a) and 19 in subdivision (h) shall be read as references to Bankruptcy Rules 715 and 719 respectively; and

(4) an objection to the jurisdiction of the court of bankruptcy is governed by Rule 915.

Rule 713. Counterclaim and cross-claim.

Rule 13 of the Federal Rules of Civil Procedure applies in adversary proceedings, except that (1) subdivision (f) does not apply, (2) a party sued by a trustee or receiver need not state as a counterclaim any claim which he has against the bankrupt, his property, or the estate, (3) when a trustee or receiver fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, he may by leave of court set up the omitted counterclaim by amendment or by commencing a new adversary proceeding or separate action, and (4) persons other than the original parties to the adversary proceeding may be made parties to a counterclaim or cross-claim in accordance with Rules 719 and 720.

Rule 714. Third-party practice.

Rule 14 of the Federal Rules of Civil Procedure applies in adversary proceedings except as the court otherwise directs. A third-party defendant served under this rule shall make his defenses as provided in Rule 712 and his counterclaims as provided in Rule 713.

Rule 715. Amended and supplemental pleadings.

Rule 15 of the Federal Rules of Civil Procedure applies in adversary proceedings excepts that (1) a pleading to which no responsive pleading is permitted may be amended as a matter of course at any time within 15 days after it is served but before the date set for trial and that (2) a party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 5 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Rule 716. Pre-trial procedure; formulating issues.

Rule 16 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 717. Parties plaintiff and defendant; capacity.

Except as provided in Rules 212 (f) and 512 (d), Rule 17 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 718. Joinder of claims and remedies.

Rule 18 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 719. Joinder of persons needed for just determination.

(*a*) *Persons to be joined if feasible.*—A person who is subject to service of process shall be joined as a party in the proceeding if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the proceeding and is so situated that the disposition of the proceeding in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff.

(*b*) *Objection to jurisdiction by joined person.*—If a person joined under subdivision (a) hereof makes a timely objection as provided in Rule 915 to the jurisdiction of the court to determine issues affecting his interest and the objection is sustained, the court shall dismiss such person from the proceeding or, pursuant to Rule 915 (b), transfer the part of the proceeding involving his interest to the civil docket of the district court.

(*c*) *Determination by court whenever joinder or proceeding with joined person not feasible.*—If a person as described in subdivision (a) hereof cannot be made a party, or if such a person is dismissed or the part of the proceeding involving his interest is transferred pursuant to subdivision (b) hereof, the court shall determine whether in equity and good conscience the proceeding should continue among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the proceeding is dismissed for nonjoinder.

(*d*) *Pleading reasons for nonjoinder.*—A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) who are not joined, and the reasons why they are not joined.

(*e*) *Exception of class proceedings.*—This rule is subject to the provisions of Rule 723.

Rule 720. Permissive joinder of parties.

Rule 20 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 721. Misjoinder and nonjoinder of parties.

Rule 21 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 722. Interpleader.

Rule 22 (1) of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 723. Class proceedings.

Rule 23 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 723.1. Derivative proceedings by shareholders.

Rule 23.1 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 723.2. Adversary proceedings relating to unincorporated associations.

Rule 23.2 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 724. Intervention.

Rule 24 of the Federal Rules of Civil Procedure applies in adversary proceedings except that a person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 705.

Rule 725. Substitution of parties.

Subject to the provisions of Rule 221 (b), Rule 25 of the Federal Rules of Civil Procedure applies in adversary procedings, but a motion for substitution under this rule shall be served and filed as provided in Rules 704 and 705.

Rule 726. General provisions governing discovery.

Rule 26 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 727. Depositions before adversary proceedings or pending appeal.

(*a*) *Before adversary proceeding.*

(*1*) *Application.*—A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in an adversary proceeding may file an application with the court in a pending bankruptcy case. The application shall show: (A) that the applicant expects to be a party to an adversary proceeding but is presently unable to bring it or cause it to be brought; (B) the subject matter of the expected proceeding and the applicant's interest therein; (C) the facts which the applicant desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; (D) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (E) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each. The application shall ask for an order authorizing the applicant to take depositions of the persons to be examined named in the application, for the purpose of perpetuating their testimony.

(*2*) *Notice and service.*—The applicant shall thereafter serve a notice upon each person named in the application as an expected adverse party, together with a copy of the application, stating that the applicant will apply to the court, at a time and place named therein, for the order described in the application. At least 20 days before the date of hearing the notice shall be served in the manner provided in Rule 704 (b) or (c) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the application, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 704 (b) or (c), an attorney who shall represent them. If any expected adverse party is a minor or incompetent the provisions of Rule 717 apply.

(*3*) *Order and examination.*—If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 734 and 735.

(*b*) *Pending appeal.*—If an appeal has been taken from a judgment of a referee or before the taking of an appeal if the time therefor has not expired, the referee who rendered the judgment may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings before the referee. In such case the party who desires to perpetuate the testimony may make a motion before the referee for leave to take the depositions, upon the same notice and service thereof as if the proceeding were pending before the referee. The motion shall show (1) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the referee finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, he may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 734 and 735, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in proceedings pending before the referee.

Rule 728. Persons before whom depositions may be taken.

Rule 28 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 729. Stipulations regarding discovery procedure.

Rule 29 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 730. Depositions upon oral examination.

Rule 30 of the Federal Rules of Civil Procedure applies in adversary proceedings, except that the 30-day period during which leave of court must be obtained under subdivision (a) for the taking of a deposition runs from the issuance of the summons under Rule 704 and that the attendance of witness may be compelled by the use of subpoena as provided in Rule 916.

Rule 731. Deposition upon written questions.

Rule 31 of the Federal Rules of Civil Procedure applies in adversary proceedings, except that the attendance of witnesses may be compelled by the use of subpoena as provided in Rule 916.

Rule 732. Use of depositions in adversary proceedings.

Rule 32 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 733. Interrogatories to parties.

Rule 33 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 734. Production of documents and things and entry upon land for inspection and other purposes.

Rule 34 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 735. Physical and mental examination of persons.

Rule 35 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 736. Requests for admission.

Rule 36 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 737. Failure to make discovery: Sanctions.

Rule 37 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 741. Dismissal of adversary proceedings.

Rule 41 of the Federal Rules of Civil Procedure applies in adversary proceedings, except that a complaint objecting to the bankrupt's discharge shall not be dismissed at the plaintiff's instance save upon notice to the trustee and upon order of the court containing such terms and conditions as the court deems proper, and the reference in subdivision (b) of that rule to Rule 19 shall be read as a reference to Rule 719.

Rule 742. Consolidation of adversary proceedings; separate trials.

Rule 42 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 744.1. Determination of foreign law.

Rule 44.1 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 752. Findings by the court.

(*a*) *Effect.*—In all matters tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and the judgment shall be entered pursuant to Rule 921 (a). Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under these rules except when, on a motion to dismiss under Rule 741, the court renders a judgment on the merits after a trial on the facts.

(*b*) *Amendment.*—Upon motion of a party made not later than 10 days after entry of a judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial or to alter or amend a judgment pursuant to Rule 923. When findings of fact are made in matters tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made before the court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 754. Judgments; costs.

(*a*) *Judgments.*—Subdivisions (a), (b), and (c) of Rule 54 of the Federal Rules of Civil Procedure apply in adversary proceedings.

(*b*) *Costs.*—On one day's notice costs may be taxed and judgment therefor rendered by the court.

Rule 755. Default.

(*a*) *Entry.*—When a judgment is sought against a party in adversary proceedings and such party has, without sufficient excuse, (1) failed to plead or otherwise defend or, (2) having filed a pleading or motion, is not ready to proceed with trial on the day set therefor in accordance with these rules, the court upon request therefor shall enter a judgment by default, except as provided hereinafter. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as it deems necessary and proper. No judgment by default shall be entered against an infant or incompetent person unless represented in the proceeding by a general guardian, committee, conservator, or other such representative who has appeared therein.

(*b*) *Setting aside judgment by default.*—For good cause shown the court may set aside a judgment by default in accordance with Rule 924.

(*c*) *Plaintiffs, counterclaimants, cross-claimants.*—The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c) of the Federal Rules of Civil Procedure.

(*d*) *Judgment against the United States.*—No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

Rule 756. Summary judgment.

Rule 56 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 762. Stay of proceedings to enforce a judgment.

Subject to the provisions of Rule 805, Rule 62 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 764. Seizure of person or property.

Rule 64 of the Federal Rules of Civil Procedure applies in adversary proceedings except that an adversary proceeding in which any of the remedies referred to in that rule is used shall be commenced and prosecuted pursuant to these rules.

Rule 765. Injunctions.

Rule 65 of the Federal Rules of Civil Procedure applies in adversary proceedings except that a temporary restraining order or preliminary injunction may be issued on application of a trustee, receiver, or bankrupt without compliance with subdivision (c) of that rule. When security is required under subdivision (c) of that rule and is given in the form of a bond or other undertaking, Rule 925 governs its enforcement against the surety thereon.

Rule 767. Deposit in court.

Rule 67 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 768. Offer of judgment.

Rule 68 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 769. Execution.

Rule 69 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 770. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a transfer or to deliver a document or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the court shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. In proper cases the disobedient party may also be held in contempt in proceedings under Rule 920. The court in lieu of directing a transfer of real or personal property may enter a judgment divesting the title of any party thereto and vesting it in others and such judgment has the effect of a transfer executed in due form of law. When any judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the court.

Rule 771. Process in behalf of and against persons not parties.

Rule 71 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 782. Transfer of adversary proceeding.

Upon notice and hearing afforded the parties, any adversary proceeding may, in the interest of justice and for the convenience of the parties, be transferred by the court to any other district and shall thereafter continue as if originally filed in such district. An adversary proceeding transferred under this rule shall be referred to a referee by the clerk of the court to which it has been transferred.

PART VIII. APPEAL TO DISTRICT COURT

Rule 801. Manner of taking appeal.

An appeal from a judgment or order of a referee to a district court shall be taken by filing a notice of appeal with the referee within the time allowed by Rule 802. Failure of an appellant to take any step other than that specified in the first sentence does not affect the validity of the appeal, but is ground only for such action as the district court deems appropriate, which may include dismissal of appeal. The notice of appeal shall conform substantially to Official Form No. 28, shall contain the names of all parties to the judgment or order appealed from and the names and addresses of their respective attorneys, and shall be accompanied by the fee fixed by the Judicial Conference of the United States pursuant to § 40c of the Act. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the referee to comply promptly with Rule 804.

Rule 802. Time for filing notice of appeal.

(*a*) *Ten-day period.*—The notice of appeal shall be filed with the referee within 10 days of the date of the entry of the judgment or order appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(*b*) *Effect of motion on time for appeal.*—The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed with the referee by any party pursuant to the rules hereafter enumerated in this subdivision. The full time for appeal fixed by this rule commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment notwithstanding the verdict under Rule 115(b)(4); (2) granting or denying a motion under Rule 752 (b) to amend or make additional findings of fact, whether or not an alternation of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 923 to alter or amend the judgment; or (4) denying a motion for a new trial under Rule 923.

(*c*) *Extension of time for appeal.*—The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property.

Rule 803. Finality of referee's judgment or order.

Unless a notice of appeal is filed as prescribed by Rules 801 and 802, the judgment or order of the referee shall become final.

Rule 804. Service of the notice of appeal.

The referee shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant or, if a party is not represented by counsel, to the party at his last known address. Failure to serve notice shall not affect the validity of the appeal. The referee shall note on each copy served the date of the filing of the notice of appeal and shall note in the docket the names of the parties to whom he mails copies and the date of the mailing.

Rule 805. Stay pending appeal.

A motion for a stay of the judgment or order of a referee, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be made in the first instance to the referee. Notwithstanding Rule 762 but subject to the power of the district court reserved hereinafter, the referee may suspend or order the continuation of proceedings or make any other appropriate order during the pendency of an appeal upon such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by the referee, may be made to the district court, but the motion shall show why the relief, modification, or termination was not obtained from the referee. The district court may condition the relief it grants under this rule upon the filing of a bond or other appropriate security with the referee. A trustee or receiver may be required to give a supersedeas bond or other appropriate security in order to obtain a stay when taking an appeal.

Rule 806. Record and issues on appeal.

Within 10 days after filing the notice of appeal the appellant shall file with the referee and serve on the appellee a designation of the contents for inclusion in the record on appeal and a statement of the issues he intends to present on the appeal. The record shall include the contents so designated and the findings of fact, conclusions of law, and orders entered thereon. If the appellee deems any other papers to be necessary, he shall, within 7 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional papers to be included. If the record designated by any party includes a transcript of any proceeding or a part thereof, he shall immediately after the designation order the transcript and make satisfactory arrangements for payment of its costs. All parties shall take any other action necessary to enable the referee to assemble and transmit the record.

Rule 807. Transmission of the record; docketing of the appeal.

The record on appeal shall be transmitted by the referee to the clerk of the district court within 30 days after the filing of the statement of the issues unless a different time is prescribed by order of the district court, and the clerk shall thereupon enter the appeal on the docket.

Rule 808. Filing and service of briefs.

Unless a local rule or court order excuses the filing of briefs or provides for different time limits:

(1) The appellant shall serve and file his brief within 15 days after entry of the appeal on the docket pursuant to Rule 807.

(2) The appellee shall serve and file his brief within 15 days after service of the brief of the appellant.

(3) The appellant may serve and file a reply brief within 5 days after service of the brief of the appellee.

Rule 809. Oral argument.

Unless otherwise provided by local rule or court order the parties shall be given an opportunity to be heard on oral argument.

Rule 810. Disposition of appeal; weight accorded referee's findings.

Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of the witnesses.

Rule 811. Costs.

Except as otherwise provided by law, agreed to by the parties, or ordered by the court, costs shall be taxed against the losing party on an appeal; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed by the referee as costs of the appeal in favor of the party entitled to costs under this rule.

Rule 812. Motion for rehearing.

Unless otherwise provided by local rule or court order, a motion for rehearing may be filed within 10 days after entry of the judgment of the district court.

Rule 813. Duties of clerk on disposition of appeal.

Immediately upon the entry of an order or judgment the clerk of the district court shall serve a notice of the entry by mail upon each party to the appeal, together with a copy of any opinion respecting the order or judgment, and shall make a note of the mailing in the docket.

Original papers transmitted as the record on appeal shall be returned to the referee upon disposition of the appeal.

Rule 814. Suspension of rules in Part VIII.

In the interest of expediting decision or for other good cause, the district court may, by local rule or order, suspend the requirements or provisions of the rules in Part VIII, except Rules 801, 802, 803, and 810, and may also order proceedings in accordance with its direction.

PART IX. GENERAL PROVISIONS

Rule 901. General definitions.

The definitions of words and phrases in § 1 of the Act govern their use in these rules to the extent they are not inconsistent with the rules. In addition, the following words and phrases used in these rules have the meanings herein indicated unless they are inconsistent with the context:

(1) "Accountant" includes an accounting partnership or corporation.

(2) "Act" means the Bankruptcy Act.

(3) "Affiliate" of a bankrupt means (A) a corporation 25 per cent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the bankrupt, or (B) a person who directly or indirectly owns, controls, or holds with power to vote, 25 per cent or more of the outstanding voting securities of the bankrupt, or (C) a corporation 25 per cent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by a person who directly or indirectly owns, controls, or holds with power to vote, 25 per cent or more of the outstanding voting securities of the bankrupt, or (D) a person substantially all of whose property is operated under lease or operating agreement by the bankrupt, or (E) a person who operates under lease or operating agreement substantially all of the property of the bankrupt.

(4) "Application" includes any request to the court for relief that is not a pleading or proof of claim. An application not made in open court shall be in writing unless a writing is excused by the court. An application for an order against another party may be required to be made by motion.

(5) "Attorney" includes a law partnership or corporation.

(6) "Bankrupt." When any act is required by these rules to be performed by a bankrupt or when it is necessary to compel attendance of a bankrupt for examination and the bankrupt is not a natural person: (A) if the bankrupt is a corporation, "bankrupt" includes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control; (B) if the bankrupt is a partnership, "bankrupt" includes any or all of its general partners or, if designated by the court, any other person in control.

(7) "Bankruptcy judge" means the referee of the court of bankruptcy in which a bankruptcy case is pending, or the district judge of that court when issuing an injunction under § 2a (15) of the Act and when acting in lieu of a referee under § 43c of the Act or under Rule 102.

(8) "Judgment" includes any order appealable to the district court or, if entered by a district judge when acting as a bankruptcy judge, appealable to the court of appeals.

(9) "Motion" means an application to the court for an order in an adversary proceeding or in a proceeding on a contested petition, to vacate an adjudication, or to determine any other contested matter. Unless made during a hearing or trial, a motion shall be made in writing, shall conform substantially to a pleading in form, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(10) "Pleadings" include those allowed by Rule 7 (a) of the Federal Rules of Civil Procedure and the petition and the responsive pleadings allowed by Rule 112.

Rule 902. Meanings of words in the Federal Rules of Civil Procedure when applicable in bankruptcy cases.

The following words and phrases used in the Federal Rules of Civil Procedure made applicable in bankruptcy cases by these rules have the meanings herein indicated unless they are inconsistent with the context:

(1) "Action" or "civil action" means an adversary proceeding or, when appropriate, a proceeding on a contested petition, to vacate an adjudication, or to determine any other contested matter.

(2) "Appeal" includes appeal from the referee to the district court, and "appellate court" means the district court.

(3) "Clerk" or "clerk of the district court" means an assistant employed by the referee and designated as his clerk by the referee's order, unless the offices of the clerk of the district court and the referee are consolidated or a proceeding is before the district judge.

(4) "District court," "trial court," "court," or "judge" means bankruptcy judge.

(5) "Judgment" includes any order appealable to the district court or, if entered by a district judge when acting as a bankruptcy judge, appealable to the court of appeals.

Rule 903. Rule of construction.

These rules shall be construed to secure the expeditious and economical administration of every bankrupt estate and the just, speedy, and inexpensive determination of every proceeding in bankruptcy.

Rule 904. General requirements of form.

(*a*) *Legibility; abbreviations.*—All pleadings, schedules, and other papers shall be clearly legible. Abbreviations in common use in the English language may be used.

(*b*) *Caption.*—Each paper filed shall contain a caption setting forth the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper.

Rule 905. Harmless error.

Rule 61 of the Federal Rules of Civil Procedure applies in bankruptcy cases. When appropriate, the court may order or effect correction of such an error or defect.

Rule 906. Time.

(*a*) *Computation.*—In computing any period of time in a bankruptcy case Rule 6 (a) of the Federal Rules of Civil Procedure applies.

(*b*) *Enlargement.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without application or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon application made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 107 (b)(2), 115 (b)(4) insofar as it makes Rule 50 (b) of the Federal Rules of Civil Procedure applicable in bankruptcy cases, 302 (e), 403 (c), 607, 752 (b), 802, 923, and 924, except to the extent and under the conditions stated in them.

(*c*) *Reduction.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may in its discretion with or without application or notice order the period shortened; but it may not reduce the time for taking any action under Rules 203 (a), 204 (a)(1), 302 (e), 404 (a) and (b), 409 (a)(2), and 802, except to the extent and under the conditions stated in them.

(*d*) *For motions—Affidavits.*—Rule 6 (d) of the Federal Rules of Civil Procedure applies in bankruptcy cases, except that the reference to Rule 59 (c) shall be read as a reference to Bankruptcy Rule 923.

(*e*) *Time of service or notice by mail.*—Service or notice by mail is complete upon mailing.

Rule 907. General authority to regulate notices.

Whenever notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Whenever feasible, the court may order any notices under these rules to be combined.

Rule 908. Publication.

Whenever these rules require or authorize service or notice by publication, the court shall, to the extent not otherwise specified in these rules, determine the form and manner thereof, including the newspaper or other medium to be used and the number of publications.

Rule 909. Forms.

The official forms annexed to these rules shall be observed and used, with such alterations as may be appropriate to suit the circumstances. Forms may be combined and their contents rearranged to permit economies in their use. The Director of the Administrative Office of the United States Courts may promulgate illustrative forms for use under the Act.

Rule 910. Representation and appearances; powers of attorney.

(*a*) *Authority to act personally or by attorney.*—A bankrupt, creditor, or other party may appear in a bankruptcy case and act either in his own behalf or by an attorney authorized to practice in the court. A creditor may also perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(*b*) *Notice of appearance.*—An attorney appearing for a party shall file a notice of appearance with his name and business address unless his appearance is otherwise noted in the record.

(*c*) *Power of attorney.*—The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim shall be evidenced by a power of attorney conforming substantially to Official Form No. 13 or Official Form No. 14. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in Rule 912.

Rule 911. Signing and verification of pleadings and other papers.

(*a*) *Signature.*—Every pleading and every written motion of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated, and every written application must be so signed by an attorney or by the party making it. A party who is not represented by an attorney shall sign his pleading or written motion or application and state his address. The signature of an attorney on any pleading, motion, or application served or filed in a bankruptcy case constitutes a certificate by him that he has read the paper; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay or other improper purpose. If a pleading, or written motion or application, is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the case may proceed as though the paper had not been served or filed. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

(*b*) *Verification.*—Except as otherwise specifically provided by these rules, papers filed in a bankruptcy case need not be verified.

(*c*) *Copies of signed or verified papers.*—When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Rule 912. Oaths and affirmations.

(*a*) *Persons authorized to administer oaths.*—A referee, a person designated by the referee in an order filed in the office of the clerk of the district court, an officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country, may administer oaths and affirmations and take acknowledgments.

(*b*) *Affirmation in lieu of oath.*—Whenever in a bankruptcy case an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

Rule 913. Habeas corpus.

(*a*) *For performance of duties under the Act.*—The bankruptcy judge may issue a writ of habeas corpus when appropriate to bring a person before the court for examination or to testify or to perform a duty imposed upon him under the Act.

(*b*) *For release of bankrupt from imprisonment.*—If the bankrupt is arrested or imprisoned on process in any civil action, the bankruptcy judge may issue a writ of habeas corpus and, after hearing on notice to the adverse party in such action, may order the bankrupt's release if the process is found to have been issued for the collection of a dischargeable debt.

Rule 914. Procedure in contested matters not otherwise provided for.

In a contested matter in a bankruptcy case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. In all such matters, unless the court otherwise directs, the following rules shall apply: 721, 725, 726, 728–737, 741, 742, 744.1, 752, 754–756, 762, 764, 769, and 771. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a pending bankruptcy case may proceed in the same manner as provided in Rule 727 for the taking of a deposition before an adversary proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to contested matters. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

Rule 915. Objection to jurisdiction of court of bankruptcy.

(*a*) *Waiver of objection to jurisdiction.*—Except as provided in Rule 112 and subject to Rule 928, a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served.

(*b*) *Dismissal or transfer.*—If an objection to the jurisdicion of an adversary proceeding, a contested matter, or a severable part of either, is sustained, the bankruptcy judge shall dismiss such proceeding, matter, or part thereof, or transfer it to the civil docket of the district court, as may be appropriate. On transfer pursuant to this rule, the proceeding, matter, or part thereof shall continue as if filed as a civil action in the district court on the date it was filed in the court of bankruptcy.

Rule 916. Subpoena.

Rule 45 of the Federal Rules of Civil Procedure applies in bankruptcy cases, except that subpoenas may be issued in the name and under the authority of the bankruptcy judge and need not be under the seal of the court.

Rule 917. Evidence.

The Federal Rules of Evidence apply in bankruptcy cases, subject to specific provisions in these rules governing matters of evidence.

Rule 918. Secret, confidential, scandalous, or defamatory matter.

On application or on its own initiative the court may make any order which justice requires (1) to protect the estate or any person in respect of a trade secret or other confidential research, development, or commercial information, or (2) to protect any person against scandalous or defamatory matter contained in any paper filed in a bankruptcy case. If an order is entered under this rule without notice, any person affected thereby may move to vacate or modify the order, and on notice the court shall determine such motion.

Rule 919. Compromise and arbitration.

(*a*) *Compromise.*—On application by the trustee or receiver and after hearing on notice to the creditors as provided in Rule 203 (a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

(*b*) *Arbitration.*—On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

Rule 920. Contempt proceedings.

(*a*) *Contempt committed in proceedings before referee.*

(*1*) *Summary disposition by referee.*—Misbehavior prohibited by § 41a (2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(*2*) *Disposition by referee upon notice and hearing.*—Any other conduct prohibited by § 41a of the Act may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(*3*) *Limits on punishment by referee.*—A referee shall not order imprisonment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(*4*) *Certification to district judge.*—If it appears to a referee that conduct prohibited by § 41a of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

(*b*) *Contempt committed in proceedings before district judge.*—Any contempt committed in proceedings before a district judge while acting as a bankruptcy judge shall be prosecuted as any other contempt of the district court.

(*c*) *Right to jury trial.*—Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Rule 921. Entry of judgment; district court record of referee's judgment.

(*a*) *Original entry on referee's docket.*—A judgment in an adversary proceeding or contested matter shall be set forth on a separate document. Every judgment shall be entered forthwith in the referee's docket as provided in Rule 504 or, if the judgment is by the district judge, in the civil docket as provided in Rule 79 (a) of the Federal Rules of Civil Procedure. A judgment is effective only when entered as required by this subdivision.

(*b*) *District court record of referee's judgment.*—On certification by the referee to the clerk of the district court of a copy of a judgment of the referee for the recovery of money or property, the clerk shall keep and index the copy in substantially the form and manner prescribed by Rule 79 of the Federal Rules of Civil Procedure for judgments of the district court. Retention and indexing of a judgment by the clerk under this subdivision shall not affect its appealability or proceedings on appeal from the judgment under the rules in Part VIII, the availability of process to enforce the judgment under Rule 769, or the availability of relief under Rule 762 or 770, but after it has been so indexed, the referee's judgment shall have the same effect and may be enforced as a judgment of the district court so indexed.

Rule 922. Notice of judgment or order.

(*a*) *Judgment or order of a referee.*—Immediately upon the entry of a judgment or order made by him, the referee shall serve a notice of the entry by mail in the manner provided by Rule 705 upon any party who opposed the making of the judgment or order and on such other persons as may be designated by the referee. The service of such notice shall be noted in the referee's docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 802.

(*b*) *Judgment or order of district judge.*—Notice of a judgment or order of a district judge while acting in a bankruptcy case pursuant to Rule 102 is governed by Rule 77 (d) of the Federal Rules of Civil Procedure.

Rule 923. New trials; amendment of judgments.

Except as provided in Rule 307, Rule 59 of the Federal Rules of Civil Procedure applies in bankruptcy cases.

Rule 924. Relief from judgment or order.

Rule 60 of the Federal Rules of Civil Procedure applies in bankruptcy cases, except that a motion to reopen a case or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one-year limitation therein prescribed. This rule does not permit extension of the time allowed by § 15 of the Act for the filing of a complaint to revoke a discharge.

Rule 925. Security: Proceedings against sureties.

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court, and his liability may be enforced in an adversary proceeding governed by the rules in Part VII.

Rule 926. Exceptions unnecessary.

Rule 46 of the Federal Rules of Civil Procedure applies in bankruptcy cases.

Rule 927. Local bankruptcy rules.

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing practice and procedure under the Act not inconsistent with these rules. Copies of rules and amendments so made shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, for making copies of such rules available to members of the public who may request them. In all cases not provided for by rule, the district court may regulate its practice in any manner not inconsistent with these rules.

Rule 928. Jurisdiction unaffected.

These rules shall not be construed to extend or limit the jurisdiction of courts of bankruptcy over subject matter.

OFFICIAL BANKRUPTCY FORMS

[NOTE. These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Rule 909.]

FORM No. 1

PETITION FOR VOLUNTARY BANKRUPTCY

United States District Court
for the............. District of.............

In re ...., *Bankrupt [include here all names used by bankrupt within last 6 years]*	Bankruptcy No.........

VOLUNTARY PETITION

1. Petitioner's post-office address is..........................
....

2. Petitioner has resided [*or* has had his domicile *or* has had his principal place of business] within this district for the preceding 6 months [*or* for a longer portion of the preceding 6 months than in any other district].

3. Petitioner is qualified to file this petition and is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt.

Wherefore petitioner prays for relief as a voluntary bankrupt under the Act.

Signed: ....,
Attorney for Petitioner.
Address: ....,
....

[Petitioner signs if not represented by attorney.]

.................................,
Petitioner.

State of..............
County of............ } *ss.*

I, ..., the petitioner named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

.................................,
Petitioner.

Subscribed and sworn to before me on ....

................................,

....

[*Official character*]

[*Unless further time is granted by the court pursuant to Rule 108, this petition must be accompanied by a schedule of the petitioner's debts and property, his claim for such exemptions as he may be entitled to, and a statement of his affairs. These additional statements shall be submitted on official forms, shall include the information about the petitioner's property and debts required by the Bankruptcy Rules and by the forms, and shall be verified under oath.*]

FORM No. 2

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

[*Caption, other than designation, as in Form No. 1*]

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

1. Applicant is filing herewith a voluntary petition in bankruptcy.
2. He is unable to pay the filing fees except in installments.
3. He proposes to pay such fees to the clerk of the district court upon the following terms:

....

....

4. He has paid no money and transferred no property to his attorney for services in connection with this case or any pending case under the Act, and he will make no payment or transfer to his attorney for such services until the filing fees are paid in full.

Wherefore applicant prays that he be permitted to pay the filing fees in installments.

Dated: ....

Signed: ....,
Applicant.

Address: ....,
....

FORM No. 3

ORDER FOR PAYMENT OF FILING FEES IN INSTALLMENTS

[*Caption, other than designation, as in Form No. 1*]

ORDER FOR PAYMENT OF FILING FEES IN INSTALLMENTS

The application of the bankrupt for permission to pay the filing fees in this case in installments having been heard;

It is ordered that the bankrupt pay the filing fees still owing, namely, $................, as follows: ....

....

....

It is further ordered that all payments be made at the office of the clerk of the United States District Court located at ...., and that until the filing fees are paid in full, the bankrupt shall pay no money and shall transfer no property to his attorney, and his attorney shall accept no money or property from the bankrupt for services in connection with this case.

Dated: ....

....................................,

Bankruptcy Judge.

FORM No. 4

VERIFICATION ON BEHALF OF A CORPORATION

State of............................ } *ss.*
County of......................... }

I, ..., the president [*or other officer or* an authorized agent] of the corporation named as petitioner in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief, and that the filing of this petition on behalf of the corporation has been authorized.

....

Subscribed and sworn to before me on......................

....................................,

....

[*Official character*]

FORM No. 5

VERIFICATION ON BEHALF OF A PARTNERSHIP

State of............................ } *ss.*
County of.......................... }

I, ..., a member [*or* an authorized agent] of the partnership named as petitioner in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief, and that the filing of this petition on behalf of the partnership has been authorized.

....

Subscribed and sworn to before me on.......................

....,

....

[*Official character*]

FORM No. 6

SCHEDULES

[*Caption, other than designation, as in Form No. 1*]

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT

Schedules A-1, A-2, and A-3 must include all the claims against the bankrupt or his property as of the date of the filing of the petition by or against him.

Schedule A-1.—Creditors having priority.

Nature of claim.	Name of creditor and residence of place of business [if unknown, so state].	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, or subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Amount of claim.

a. Wages and commissions owing to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, not exceeding $600 to each, earned within 3 months before filing of petition .... $ ....

b. Taxes owing [itemize by type of tax and taxing authority]

(1) To the United States..................... ....

(2) To any state............................ ....

(3) To any other taxing authority.............. ....

c. (1) Debts owing to any person, including United States, entitled to priority by laws of United States [itemize by type]............................ ....

(2) Rent owing to a landlord entitled to priority by laws of any state accrued within 3 months before filing of petition, for actual use and occupancy..... ....

Total........

Schedule A-2.—Creditors holding security.

Name of creditor and residence or place of business [if unknown, so state].	Description of security and date when obtained by creditor.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Market value.	Amount of claim without deduction of value of security.
			....	....
		Total........		

Schedule A-3.—Creditors having unsecured claims without priority.

Name of creditor [including last known holder of any negotiable instrument] and residence or place of business [if unknown, so state].	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Amount of claim.
		$........
	Total........	

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT

Schedules B-1, B-2, B-3, and B-4 must include all property of the bankrupt as of the date of the filing of the petition by or against him.

Schedule B-1.—Real property.

Description and location of all real property in which bankrupt has an interest [including equitable and future interests, interests in estates by the entirety, community property, life estates, leaseholds, and rights and powers exercisable for his own benefit].	Nature of interest [specify all deeds and written instruments relating thereto].	Market value of bankrupt's interest without deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4.
		$........
	Total........	

Schedule B-2.—Personal Property.

Type of property	Description and location	Market value of bankrupt's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4.

a. Cash on hand	$........
b. Deposits of money with banking institutions, savings and loan associations, credit unions, public utility companies, landlords, and others	....
c. Household goods, supplies, and furnishings	....
d. Books, pictures, and other art objects; stamp, coin, and other collections	....
e. Wearing apparel, jewelry, firearms, sports equipment, and other personal possessions	....
f. Automobiles, trucks, trailers, and other vehicles	....
g. Boats, motors, and their accessories	....
h. Livestock, poultry, and other animals	....
i. Farming supplies and implements	....
j. Office equipment, furnishings, and supplies	....
k. Machinery, fixtures, equipment, and supplies [other than those listed in Items j and l] used in business	....
l. Inventory	....
m. Tangible personal property of any other description	....
n. Patents, copyrights, franchises, and other general intangibles [specify all documents and writings relating thereto]	....
o. Government and corporate bonds and other negotiable and nonnegotiable instruments	....
p. Other liquidated debts owing bankrupt or debtor	....
q. Contingent and unliquidated claims of every nature, including counterclaims of the bankrupt or debtor [give estimated value of each]	....
r. Interest in insurance policies [itemize surrender or refund values of each]	....
s. Annuities	....
t. Stocks and interests in incorporated and unincorporated companies [itemize separately]	....
u. Interests in partnerships	....
v. Equitable and future interests, life estates, and rights or powers exercisable for the benefit of the bankrupt or debtor [specify all written instruments relating thereto]	....
Total........	

Schedule B-3.—Property not otherwise scheduled.

Type of property	Description and location	Market value of bankrupt's interest without deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4.
a. Property transferred under assignment for benefit of creditors, within 4 months prior to filing of petition [specify date of assignment, name and address of assignee, amount realized therefrom by the assignee, and disposition of proceeds so far as known to bankrupt]		$ ....
b. Property of any kind not otherwise scheduled........		....
Total........		

Schedule B-4.—Property claimed as exempt.

Type of property	Location, description, and, so far as relevant to the claim of exemption, present use of property.	Reference to statute creating the exemption.	Value claimed exempt
			$........
		Total........	

Summary of debts and property

[From the statements of the bankrupt in Schedules A and B]

Schedule		Total
	DEBTS	
A-1/a	Wages having priority....................	$........
A-1/b (1)	Taxes owing United States.................	....
A-1/b (2)	Taxes owing states.........................	....
A-1/b (3)	Taxes owing other taxing authorities........	....
A-1/c (1)	Debts having priority by laws of United States	....
A-1/c (2)	Rent having priority under state law........	....
A-2	Secured claims............................	....
A-3	Unsecured claims without priority...........	....
	Schedule A total..............	

Schedule		Total
	PROPERTY	
B-1	Real property [total value]................	$........
B-2/a	Cash on hand...........................	....
B-2/b	Deposits	....
B-2/c	Household goods........................	....
B-2/d	Books, pictures, and collections..............	....
B-2/e	Wearing apparel and personal possessions....	....
B-2/f	Automobiles and other vehicles.............	....
B-2/g	Boats, motors, and accessories...............	....
B-2/h	Livestock and other animals................	....
B-2/i	Farming supplies and implements...........	....
B-2/j	Office equipment and supplies...............	....
B-2/k	Machinery, equipment, and supplies used in business	....
B-2/l	Inventory	....
B-2/m	Other tangible personal property............	....
B-2/n	Patents and other general intangibles........	....
B-2/o	Bonds and other instruments...............	....
B-2/p	Other liquidated debts...................	....
B-2/q	Contingent and unliquidated claims.........	....
B-2/r	Interests in insurance policies..............	....
B-2/s	Annuities	....
B-2/t	Interests in corporations and unincorporated companies	....
B-2/u	Interests in partnerships..................	....
B-2/v	Equitable and future interests, rights, and powers in personalty...................	....
B-3/a	Property assigned for benefit of creditors....	....
B-3/b	Property not otherwise scheduled...........	....
B-4	Property claimed as exempt...............	....
	Schedule B total..............	

OATH OF INDIVIDUAL TO SCHEDULES A AND B

State of............................ } *ss.*
County of.......................... }

I, ..., do hereby swear that I have read the foregoing schedules, consisting of .... sheets, and that they are a statement of all my debts and all my property in accordance with the Bankruptcy Act, to the best of my knowledge, information, and belief.

Signed: ....

Subscribed and sworn to before me on......................

..................................,

....

[Official character]

OATH ON BEHALF OF CORPORATION TO SCHEDULES A AND B

State of............................ }
County of.......................... } *ss.*

I, ..., the president [*or other officer or* an authorized agent] of the corporation named as bankrupt in this proceeding, do hereby swear that I have read the foregoing schedules, consisting of .... sheets, and that they are a statement of all the debts and all the property of the corporation in accordance with the Bankruptcy Act, to the best of my knowledge, information, and belief.

Signed: ....

Subscribed and sworn to before me on......................

..................................,

....

[Official character]

OATH ON BEHALF OF PARTNERSHIP TO SCHEDULES A AND B

State of............................ }
County of.......................... } *ss.*

I, ..., a member [*or* an authorized agent] of the partnership named as bankrupt in this proceeding, do hereby swear that I have read the foregoing schedules, consisting of .... sheets, and that they are a statement of all the debts and all the property of the partnership in accordance with the Bankruptcy Act, to the best of my knowledge, information, and belief.

Signed: ....

Subscribed and sworn to before me on......................

..................................,

....

[Official character]

FORM No. 7

STATEMENT OF AFFAIRS FOR BANKRUPT NOT ENGAGED IN BUSINESS

[*Caption, other than designation, as in Form No. 1*]

STATEMENT OF AFFAIRS FOR BANKRUPT NOT ENGAGED IN BUSINESS

[Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet, properly identified and made a part hereof, should be used and attached.

The term, "original petition," as used in the following questions, shall mean the petition filed under Bankruptcy Rule 103, 104, or 105.]

1. Name and residence.

a. What is your full name and social security number?

b. Have you used, or been known by, any other names within the 6 years immediately preceding the filing of the original petition herein? (If so, give particulars.)

c. Where do you now reside?

d. Where else have you resided during the 6 years immediately preceding the filing of the original petition herein?

2. Occupation and income.

a. What is your occupation?

b. Where are you now employed? (Give the name and address of your employer, or the address at which you carry on your trade or profession, and the length of time you have been so employed.)

c. Have you been in a partnership with anyone, or engaged in any business during the 6 years immediately preceding the filing of the original petition herein? (If so, give particulars, including names, dates, and places.)

d. What amount of income have you received from your trade or profession during each of the 2 calendar years immediately preceding the filing of the original petition herein?

e. What amount of income have you received from other sources during each of these 2 years? (Give particulars, including each source, and the amount received therefrom.)

3. Tax returns and refunds.

a. Where did you file your last federal and state income tax returns for the 2 years immediately preceding the filing of the original petition herein?

b. What tax refunds (income and other) have you received during the year immediately preceding the filing of the original petition herein?

c. To what tax refunds (income or other, if any, are you, or may you be, entitled? (Give particulars, including information as to any refund payable jointly to you and your spouse or any other person.)

4. Bank accounts and safe deposit boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name within the 2 years immediately preceding the filing of the original petition herein? (Give the name and address of each bank, the name in which the deposit maintained, and the name and address of every other person authorized to make withdrawals from such account.)

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash, or other valuables within the 2 years immediately preceding the filing of the original petition herein? (Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name and address of every other person who had the right of access thereto, a brief description of the contents thereof, and, if the box has been surrendered, state when surrendered, or, if transferred, when transferred, and the name and address of the transferee.)

5. Books and records.

a. Have you kept books of account or records relating to your affairs within the 2 years immediately preceding the filing of the original petition herein?

b. In whose possession are these books or records? (Give names and addresses.)

c. If any of these books or records are not available, explain.

d. Have any books of account or records relating to your affairs been destroyed, lost, or otherwise disposed of within the 2 years immediately preceding the filing of the original petition herein? (If so, give particulars, including date of destruction, loss, or disposition, and reason therefor.)

6. Property held for another person.

What property do you hold for any other person? (Give name and address of each person, and describe the property, or value thereof, and all writings relating thereto.)

7. Prior bankruptcy.

What proceedings under the Bankruptcy Act have previously been brought by or against you? (State the location of the bankruptcy court, the nature and number of each proceeding, the date when it was filed, and whether a discharge was granted or refused, the proceeding was dismissed, or a composition, arrangement, or plan was confirmed.)

8. Receiverships, general assignments, and other modes of liquidation.

a. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver, trustee, or other liquidating agent? (If so, give a brief description of the property, the name and address of the receiver, trustee, or other agent, and, if the agent was appointed in a court proceeding, the name and location of the court and the nature of the proceeding.)

b. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within one year immediately preceding the filing of the original petition herein? (If so, give dates, the name and address of the assignee, and a brief statement of the terms of assignment or settlement.)

9. Property in hands of third person.

Is any other person holding anything of value in which you have an interest? (Give name and address, location and description of the property, and circumstances of the holding.)

10. Suits, executions, and attachments.

a. Were you a party to any suit pending at the time of the filing of the original petition herein? (If so, give the name and location of the court and the title and nature of the proceeding.)

b. Were you a party to any suit terminated within the year immediately preceding the filing of the original petition herein? (If so, give the name and location of the court, the title and nature of the proceeding, and the result.)

c. Has any of your property been attached, garnished, or seized under any legal or equitable process within the 4 months immediately preceding the filing of the original petition herein? (If so, describe the property seized or person garnished, and at whose suit.)

11. Loans repaid.

What repayments on loans in whole or in part have you made during the year immediately preceding the filing of the original petition herein? (Give the name and address of the lender, the amount of the loan and when received, the amounts and dates of payments and, if the lender is a relative, the relationship.)

12. Transfers of property.

a. Have you made any gifts, other than ordinary and usual presents to family members and charitable donations, during the year immediately preceding the filing of the original petition herein?

(If so, give names and addresses of donees and dates, description, and value of gifts.)

b. Have you made any other transfer, absolute or for the purpose of security, or any other disposition, of real or tangible personal property during the year immediately and preceding the filing of the original petition herein? (Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

13. Repossessions and returns.

Has any property been returned to, or repossessed by, the seller or by a secured party during the year immediately preceding the filing of the original petition herein? (If so, give particulars including the name and address of the party getting the property and its description and value.)

14. Losses.

a. Have you suffered any losses from fire, theft, or gambling during the year immediately preceding or since the filing of the original petition herein? (Give date, name, and address.)

b. Have you during the year immediately preceding or since the filing of the original petition herein paid any money or transferred any property to the attorney or to any other person on his behalf? (If so, give particulars, including amount paid or value of property transferred and date of payment or transfer.)

c. Have you, either during the year immediately preceding or since the filing of the original petition herein, agreed to pay any money or transfer any property to an attorney at law, or to any other person on his behalf? (If so, give particulars, including amount and terms of obligation.)

State of............................ } *ss.*
County of.......................... }

I, ..., do hereby swear that I have read the answers contained in the foregoing statement of affairs and that they are true and complete to the best of my knowledge, information, and belief.

..................................,
Bankrupt.

Subscribed and sworn to before me on.........................

..................................,
....
[*Official character*]

FORM NO. 8

STATEMENT OF AFFAIRS FOR BANKRUPT ENGAGED IN BUSINESS

[*Caption, other than designation, as in Form No. 1*]

STATEMENT OF AFFAIRS FOR BANKRUPT ENGAGED IN BUSINESS

[Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached.

If the bankrupt is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of, the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition," as used in the following questions, shall mean the petition filed under Bankruptcy Rule 103, 104, or 105.]

1. Nature, location, and name of business.

a. Under what name and where do you carry on your business?

b. In what business are you engaged? (If business operations have been terminated, give the date of such termination.)

c. When did you commence such business?

d. Where else, and under what other names, have you carried on business within the 6 years immediately preceding the filing of the original petition herein? (Give street addresses, the names of any partners, joint adventurers, or other associates, the nature of the business, and the periods for which it was carried on.)

e. What is your employer identification number? Your social security number?

2. Books and records.

a. By whom, or under whose supervision, have your books of account and records been kept during the 2 years immediately preceding the filing of the original petition herein? (Give names, addresses, and periods of time.)

b. By whom have your books of account and records been audited during the 2 years immediately preceding the filing of the original petition herein? (Give names, addresses, and dates of audits.)

c. In whose possession are your books of account and records? (Give names and addresses.)

d. If any of these books or records are not available, explain.

e. Have any books of account or records relating to your affairs been destroyed, lost, or otherwise disposed of within the 2 years immediately preceding the filing of the original petition herein? (If so, give particulars, including date of destruction, loss, or disposition, and reason therefor.)

3. Financial statements.

Have you issued any written financial statements within the 2 years immediately preceding the filing of the original petition herein? (Give dates, and the names and addresses of the persons to whom issued, including mercantile and trade agencies.)

4. Inventories.

a. When was the last inventory of your property taken?

b. By whom, or under whose supervision, was this inventory taken?

c. What was the amount, in dollars, of the inventory? (State whether the inventory was taken at cost, market, or otherwise.)

d. When was the next prior inventory of your property taken?

e. By whom, or under whose supervision, was this inventory taken?

f. What was the amount, in dollars, of the inventory? (State whether the inventory was taken at cost, market, or otherwise.)

g. In whose possession are the records of the 2 inventories above referred to? (Give names and addresses.)

5. Income other than from operation of business.

What amount of income, other than from operation of your business, have you received during each of the 2 years immediately preceding the filing of the original petition herein? (Give particulars, including each source, and the amount received therefrom.)

6. Tax returns and refunds.

a. In whose possession are copies of your federal and state income tax returns for the 3 years immediately preceding the filing of the original petition herein?

b. What tax refunds (income or other) have you received during the 2 years immediately preceding the filing of the original petition herein?

c. To what tax refunds (income or other), if any, are you, or may you be, entitled? (Give particulars, including information as to any refund payable jointly to you and your spouse or any other person.)

7. Bank accounts and safe deposit boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the 2 years immediately preceding the filing of the original petition herein? (Give the name and address of each bank, the name in which the deposit was maintained, and the name and address of every person authorized to make withdrawals from such account.)

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash, or other valuables within the 2 years immediately preceding the filing of the original petition herein? (Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name and address of every person who had the right of access thereto, a description of the contents thereof, and, if the box has been surrendered, state when surrendered or, if transferred, when transferred and the name and address of the transferee.)

8. Property held for another person.

What property do you hold for any other person? (Give name and address of each person, and describe the property, the amount or value thereof and all writings relating thereto.)

9. Prior bankruptcy proceedings.

What proceedings under the Bankruptcy Act have previously been brought by or against you? (State the location of the bankruptcy court, the nature and number of proceeding, and whether a discharge was granted or refused, the proceeding was dismissed, or a composition, arrangement, or plan was confirmed.

10. Receiverships, general assignments, and other modes of liquidation.

a. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver, trustee, or other liquidating agent? (If so, give a brief description of the property and the name and address of the receiver, trustee, or other agent, and, if the agent was appointed in a court proceeding, the name and location of the court and the nature of the proceeding.)

b. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the 2 years immediately preceding the filing of the original petition herein? (If so, give dates, the name and address of the assignee, and a brief statement of the terms of assignment or settlement.)

11. Property in hands of third person.

Is any other person holding anything of value in which you have an interest? (Give name and address, location and description of the property, and circumstances of the holding.)

12. Suits, executions, and attachments.

a. Were you a party to any suit pending at the time of the filing of the original petition herein? (If so, give the name and location of the court and the title and nature of the proceeding.)

b. Were you a party to any suit terminated within the year immediately preceding the filing of the original petition herein? (If so, give the name and location of the court, the title and nature of the proceeding, and the result.)

c. Has any of your property been attached, garnished, or seized under any legal or equitable process within the 4 months immediately preceding the filing of the original petition herein? (If so, describe the property seized or person garnished, and at whose suit.)

13. Payments on loans and installment purchases.

What repayments on loans in whole or in part, and what payments on installment purchases of goods and services, have you made during the year immediately preceding the filing of the original petition herein? (Give the names and addresses of the persons receiving payment, the amounts of the loans and of the purchase price of the goods and services, the dates of the original transactions, the amounts and dates of payments, and, if any of the payees are your relatives, the relationship; if the bankrupt is a partnership and any of the payees is or was a partner or a relative of a partner, state the relationship; if the bankrupt is a corporation and any of the payees is or was an officer, director, or stockholder, or a relative of an officer, director, or stockholder, state the relationship.)

14. Transfers of property.

a. Have you made any gifts, other than ordinary and usual presents to family members and charitable donations, during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of donees and dates, description, and value of gifts.)

b. Have you made any other transfer, absolute or for the purpose of security, or any other disposition which was not in the ordinary course of business during the year immediately preceding the filing of the original petition herein? (Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and state whether the transferee is a relative, partner, shareholder, officer, or director, the consideration, if any, received for the property, and the disposition of such consideration.)

15. Accounts and other receivables.

Have you assigned, either absolutely or as security, any of your accounts or other receivables during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of assignees.)

16. Repossessions and returns.

Has any property been returned to, or repossessed by, the seller or by a secured party during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including the name and address of the party getting the property and its description and value.)

17. Business leases.

If you are a tenant of business property, what are the name and address of your landlord, the amount of your rental, the date to which rent had been paid at the time of the filing of the original petition herein, and the amount of security held by the landlord?

18. Losses.

a. Have you suffered any losses from fire, theft, or gambling during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including dates, names, and places, and the amounts of money or value and general description of property lost.)

b. Was the loss covered in whole or part by insurance? (If so, give particulars.)

19. Withdrawals.

a. If you are an individual proprietor of your business, what personal withdrawals of any kind have you made from the business during the year immediately preceding the filing of the original petition herein?

b. If the bankrupt is a partnership or corporation, what withdrawals, in any form (including compensation or loans), have been made by any member of the partnership, or by any officer, director, managing executive, or shareholder of the corporation, during the year immediately preceding the filing of the original petition herein? (Give the name and designation or relationship to the bankrupt of each person, the dates and amounts of withdrawals, and the nature or purpose thereof.)

20. Payments or transfers to attorneys.

a. Have you consulted an attorney during the year immediately preceding or since the filing of the original petition herein? (Give date, name, and address.)

b. Have you during the year immediately preceding or since the filing of the original petition herein paid any money or transferred any property to the attorney, or to any other person on his behalf? (If so, give particulars, including amount paid or value of property transferred and date of payment or transfer.)

c. Have you, either during the year immediately preceding or since the filing of the original petition herein, agreed to pay any money or transfer any property to an attorney at law, or to any other person on his behalf? (If so, give particulars, including amount and terms of obligation.)

(If the bankrupt is a partnership or corporation, the following additional questions should be answered.)

21. Members of partnership; officers, directors, managers, and principal stockholders of corporation.

a. What is the name and address of each member of the partnership, or the name, title, and address of each officer, director, and managing executive, and of each stockholder holding 25 per cent or more of the issued and outstanding stock, of the corporation?

b. During the year immediately preceding the filing of the original petition herein, has any member withdrawn from the partnership, or any officer, director, or managing executive of the corporation terminated his relationship, or any stockholder holding 25 per cent or more of the issued stock disposed of more than 50 per cent of his holdings? (If so, give name and address and reason for withdrawal, termination, or disposition, if known.)

c. Has any person acquired or disposed of 25 per cent or more of the stock of the corporation during the year immediately preceding the filing of the petition? (If so, give name and address and particulars.)

State of............................ }
County of.......................... } *ss.*

I, ..., do hereby swear that I have read the answers contained in the foregoing statement of affairs and that they are true and complete to the best of my knowledge, information, and belief.

.................................,
Bankrupt.

Subscribed and sworn to before me on ....

.................................,

....

[*Official character*]

[*Person verifying for partnership or corporation should indicate position or relationship to bankrupt.*]

Form No. 9

Creditors' Petition for Bankruptcy

[*Caption, other than designation, as in Form No. 1*]

Creditors' Petition

1. Petitioners, ...,
of *........................, and ....,
of *........................, and ....,
of *........................, are creditors of ....
..........................., of *....................., having
provable claims against him, not contingent as to liability, amounting in the aggregate, in excess of the value of securities held by them, to $500 or over. The nature and amount of petitioners' claims are as follows: ....

2. The alleged bankrupt has had his principal place of business [*or* has resided] within this district for the 6 months preceding the filing of this petition [*or* for a longer portion of the 6 months preceding the filing of this petition than in any other district].

3. The alleged bankrupt owes debts to the amount of $1,000 or over and is a person who may be adjudged an involuntary bankrupt under the Bankruptcy Act.

4. Within the 4 months preceding the filing of this petition, the alleged bankrupt committed an act of bankruptcy in that he did on

....

Wherefore petitioners pray that ....
be adjudged a bankrupt under the Act.

Signed: ....,
Attorney for Petitioners.
Address: ....,
....

[*Petitioners sign if not represented by attorney.*]

...............................,
...............................,
...............................,
Petitioners.

State of............................ }
County of.......................... } *ss.*

I, ..., one of the petitioners named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

****State post-office address.***

...................................,
Petitioner.

Subscribed and sworn to before me on ....

...................................,

....

[*Official character*]

Form No. 10

Summons to Bankrupt

[*Caption, other than designation, as in Form No. 1*]

Summons

To the above-named bankrupt:

A petition in bankruptcy having been filed on ...., in this court of bankruptcy, praying that you be adjudged a bankrupt under the Bankruptcy Act,

You are hereby summoned and required to file with this court and to serve upon the petitioners' attorney, whose address is ...., a motion or an answer* to the petition which is herewith served upon you, on or before .... If you fail to do so, you will be adjudged a bankrupt by default.

...................................,
Clerk of District Court.

[Seal of the United States District Court]

Date of issuance: ....

Form No. 11

Adjudication of Bankruptcy

[*Caption, other than designation, as in Form No. 1*]

Adjudication

On consideration of the petition filed on ...., it is adjudged that .... is a bankrupt.

Dated: ....

...................................,
Bankruptcy Judge.

---

*If you make a motion, as you may in accordance with Bankruptcy Rule 112, that rule governs the time within which your answer must be served.

FORM No. 12

ORDER FOR FIRST MEETING OF CREDITORS AND RELATED ORDERS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

[*Caption, other than designation, as in Form No. 1*]

ORDER FOR FIRST MEETING OF CREDITORS AND FIXING TIMES FOR FILING OBJECTIONS TO DISCHARGE AND FOR FILING COMPLAINT TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBTS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the bankrupt, his creditors, and other parties in interest:

.... of *.........................., having been adjudged a bankrupt on a petition filed by [*or* against] him on ...., it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at ...., on ...., at .... o'clock ... m.

2. The bankrupt shall appear in person [*or, if the bankrupt is a partnership,* by a general partner, *or, if the bankrupt is a corporation,* by its president *or other executive officer*] before the court at that time and place for the purpose of being examined.

3. .... is fixed as the last day for the filing of objections to the discharge of the bankrupt.

4. .... is fixed as the last day for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c (2) of the Bankruptcy Act.

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting the creditors may file their claims, elect a trustee, elect a committee of creditors, examine the bankrupt as permitted by the court, and transact such other business as may properly come before the meeting.

As a result of this bankruptcy, certain acts and proceedings against the bankrupt and his property are stayed as provided in Bankruptcy Rules 401 and 601.

If no objection to the discharge of the bankrupt is filed on or before the last day fixed therefor as stated in subparagraph 3 above, the bankrupt will be granted his discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4), or

---

**State post-office address.*

(8) of § 17a of the Bankruptcy Act is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged.

In order to have his claim allowed so that he may share in any distribution from the estate, a creditor must file a claim, whether or not he is included in the list of creditors filed by the bankrupt. Claims which are not filed within 6 months after the above date set for the first meeting of creditors will not be allowed, except as otherwise provided by law. A claim may be filed in the office of the undersigned bankruptcy judge on an official form prescribed for a proof of claim.

[*If a no-asset or nominal asset case, the following paragraph may be used in lieu of the preceding paragraph.*] It appears from the schedules of the bankrupt that there are no assets from which any dividend can be paid to creditors. It is unnecessary for any creditor to file his claim at this time in order to share in any distribution from the estate. If it subsequently appears that there are assets from which a dividend may be paid, creditors will be so notified and given an opportunity to file their claims.

Unless the court extends the time, any objection to the report of exempt property must be filed within 15 days after the report has been filed.

Dated: ....

.................................,
Bankruptcy Judge.

FORM No. 13

GENERAL POWER OF ATTORNEY

[*Caption, other than designation, as in Form No. 1*]

GENERAL POWER OF ATTORNEY

To .... of
*.., and
.... of
*..:

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to vote on any question that may be lawfully submitted to creditors of the bankrupt in the above-entitled case; [*if appropriate*] to vote for a trustee of the estate of the bankrupt and for a committee of creditors; to receive dividends; and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

**State post-office address.*

Dated: ....

Signed: ....

[*If appropriate*] By ....

as ....

Address: ....,

....

[*If executed by an individual*] Acknowledged before me on ....

[*If executed on behalf of a partnership*] Acknowledged before me on ...., by ...., who says that he is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on ...., by ...., who says that he is .... of the corporation named above and is authorized to execute this power of attorney in its behalf.

....................................,

....

[*Official character*]

FORM No. 14

SPECIAL POWER OF ATTORNEY

[*Caption, other than designation, as in Form No. 1*]

SPECIAL POWER OF ATTORNEY

To .... of

*..., and

.... of

*...:

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned [*if desired:* and with full power of substitution,] to attend the first meeting of creditors of the bankrupt or any adjournment thereof, and to vote in my behalf on any question that may be lawfully submitted to creditors

---

**State post-office address.*

at such meeting or adjourned meeting, and for a trustee or trustees of the estate of the bankrupt.

Dated: ....

Signed: ....

[*If appropriate*] By ....

as ....

Address: ....,

....

[*If executed by an individual*] Acknowledged before me on ....

[*If executed on behalf of a partnership*] Acknowledged before me on ...., by ...., who says that he is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on ...., by ...., who says that he is .... of the corporation named above and is authorized to execute this power of attorney in its behalf.

..................................,

....

[*Official character*]

FORM NO. 15

PROOF OF CLAIM

[*Caption, other than designation, as in Form No. 1*]

PROOF OF CLAIM

1. [*If claimant is an individual claiming for himself*] The undersigned, who is the claimant herein, resides at *...................

[*If claimant is a partnership claiming through a member*] The undersigned, who resides at *............................., is a member of ...., a partnership, composed of the undersigned and ...., of *..., and doing business at *......................................, and is authorized to make this proof of claim on behalf of the partnership.

[*If claimant is a corporation claiming through an authorized officer*] The undersigned, who resides at *....................., is the .... of ...., a corporation organized under the laws of .... and doing business at *.................................., and is authorized to make this proof of claim on behalf of the corporation.

**State post-office address.*

[*If claim is made by agent*] The undersigned, who resides at *......................., is the agent of ...., of *..........................., and is authorized to make this proof of claim on behalf of the claimant.

2. The bankrupt was, at the time of the filing of the petition initiating this case, and still is indebted [*or* liable] to this claimant, in the sum of $.............

3. The consideration for this debt [*or* ground of liability] is as follows: ....

....

4. [*If the claim is founded* on writing] The writing on which this claim is founded (or a duplicate thereof) is attached hereto [*or* cannot be attached for the reason set forth in the statement attached hereto].

5. [*If appropriate*] This claim is founded on an open account, which became [*or* will become] due on ...., as shown by the itemized statement attached hereto. Unless it is attached hereto or its absence is explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it.

6. No judgment has been rendered on the claim except ....

....

7. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. This claim is not subject to any setoff or counterclaim except

....

....

9. No security interest is held for this claim except ....

....

[*If security interest in property of the debtor is claimed*] The undersigned claims the security interest under the writing referred to in paragraph 4 hereof [*or* under a separate writing which (or a duplicate of which) is attached hereto, *or* under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such security interest is also attached hereto.

10. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is suf-

---

State post-office address.

ficient to satisfy the claim. [*If priority is claimed, state the amount and basis thereof.*] ....

....

....

Dated: ....

Signed: ....

Penalty for Presenting Fraudulent Claim.—Fine of not more than $5,000 or imprisonment for not more than 5 years or both—Title 18, U. S. C., § 152.

FORM No. 16

PROOF OF CLAIM FOR WAGES, SALARY, OR COMMISSIONS

[*Caption, other than designation, as in Form No. 1*]

PROOF OF CLAIM FOR WAGES, SALARY, OR COMMISSIONS

1. The bankrupt owes the claimant.................. $........
computed as follows:

(a) wages, salary, or commissions for services performed from .... to ....,
at the following rate or rates of compensation.......... $........

[*if appropriate*] (b) allowances and benefits, such as vacation and severance pay [*specify*].................

....

.... $........

Total amount claimed $........

2. The claimant demands priority to the extent permitted by § 64a (2) of the Bankruptcy Act.

3. The claimant has received no payment, no security, and no check or other evidence of this debt except as follows: ....

....

Dated: ....

Signed: ....,
Claimant.

Social Security Number: ....

Address: ....,

....

Penalty for Presenting Fraudulent Claim.—Fine of not more than $5,000 or imprisonment for not more than 5 years or both—Title 18, U. S. C., § 152.

FORM NO. 16A

PROOF OF MULTIPLE CLAIMS FOR WAGES, SALARY, OR COMMISSIONS

[*Caption, other than designation, as in Form No. 1*]

PROOF OF MULTIPLE CLAIMS FOR WAGES, SALARY, OR COMMISSIONS

1. The undersigned, whose address is *..., is the agent of the claimants listed in the statement appended to this proof of claim and is authorized to make this proof of claims on their behalf.

2. The bankrupt owes the claimants $..........., computed as indicated in the appended statement.

3. The claimants demand priority to the extent permitted by § 64a (2) of the Bankruptcy Act.

4. The claimants have received no payment, no security, and no check or other evidence of this debt except as follows: ....
....
....

Dated: ....

Signed: ....

Penalty for Presenting Fraudulent Claim.—Fine of not more than $5,000 or imprisonment for not more than 5 years or both—Title 18, U. S. C., § 152.

STATEMENT OF WAGE CLAIMS

Names, Addresses, & Social Security Numbers.	Dates services rendered, rates of pay, & fringe benefits.	Amounts Claimed
....	....	....
....	....	....
....	....	....

FORM NO. 17

ORDER APPROVING ELECTION OF TRUSTEE OR APPOINTING TRUSTEE AND FIXING THE AMOUNT OF HIS BOND

[*Caption, other than designation, as in Form No. 1*]

ORDER APPROVING ELECTION OF TRUSTEE OR APPOINTING TRUSTEE AND FIXING THE AMOUNT OF HIS BOND

(1) ....,
of *.., is

**State post-office address.*

hereby approved as the elected [*or* is hereby appointed] trustee of the estate of the above-named bankrupt.

(2) The amount of the bond of the trustee is fixed at $........

Dated: ....

.................................,
Bankruptcy Judge.

FORM No. 18

NOTICE TO TRUSTEE OF HIS ELECTION OR APPOINTMENT AND OF TIME FIXED FOR FILING A COMPLAINT OBJECTING TO DISCHARGE OF BANKRUPT

[*Caption, other than designation, as in Form No. 1*]

NOTICE TO TRUSTEE OF ELECTION OR APPOINTMENT AND OF TIME FIXED FOR FILING A COMPLAINT OBJECTING TO DISCHARGE OF BANKRUPT

To ....,
of *...:

You are hereby notified of your election [*or* appointment] as trustee of the estate of the above-named bankrupt. The amount of your bond has been fixed at $........ You are required to notify the undersigned forthwith of your acceptance or rejection of the office.

You are further notified that .... has been fixed as the last day for the filing by you or any other party in interest of a complaint objecting to the discharge of the bankrupt.

Dated: ....

.................................,
Bankruptcy Judge.

FORM No. 19

BOND OF TRUSTEE OR RECEIVER

[*Caption, other than designation, as in Form No. 1*]

BOND OF TRUSTEE [OR RECEIVER]

We, ...,
of *..., as
principal, and ....

**State post-office address.*

of *.., as surety, bind ourselves to the United States in the sum of $.......... for the faithful performance by the undersigned principal of his official duties as trustee [*or* receiver] of the estate of the above-named bankrupt.

Dated: ....

............................,
....

FORM NO. 20

ORDER APPROVING TRUSTEE'S BOND

[Caption, other than designation, as in Form No. 1]

ORDER APPROVING TRUSTEE'S BOND

The bond filed by ....
of *.. as trustee of the estate of the above-named bankrupt is hereby approved.

Dated: ....

............................,
Bankruptcy Judge.

FORM NO. 21

ORDER THAT NO TRUSTEE BE APPOINTED

[Caption, other than designation, as in Form No. 1]

ORDER THAT NO TRUSTEE BE APPOINTED

1. The bankrupt having been examined and the creditors not having elected a trustee; and

2. The court having determined that there is no property in the estate other than that which can be claimed as exempt, and that no other circumstances indicate the need for a trustee;

It is ordered that, until further order of the court, no trustee shall be appointed.

Dated: ....

............................,
Bankruptcy Judge.

**State post-office address.*

FORM No. 22

REPORT OF EXEMPT PROPERTY

[*Caption, other than designation, as in Form No. 1*]

REPORT OF EXEMPT PROPERTY

The following property is set apart as provided under the Bankruptcy Act as exemptions allowed by law:

The following property claimed as exempt is not set apart for the reasons indicated:

Dated: ....

.............................,
Trustee.

[*The report should describe the items of property set apart as exempt, should state the estimated value of each, the amount of money, if any, claimed and allowed, and should contain references to the statutes creating the exemptions.*]

FORM No. 23

ORDER APPROVING REPORT OF EXEMPTIONS

[*Caption, other than designation, as in Form No. 1*]

ORDER APPROVING REPORT OF EXEMPTIONS

It is ordered that the report of property, set apart as exempt to the bankrupt, a copy of which is attached hereto [*or* which was filed on ....], is approved and the claim of the bankrupt to his exemptions is allowed, except as follows:

Dated: ....

.............................,
Bankruptcy Judge.

FORM No. 24

DISCHARGE OF BANKRUPT

[*Caption, other than designation, as in Form No. 1*]

DISCHARGE OF BANKRUPT

It appearing that the person named above has filed a petition commencing a case under the Act on ...., was duly adjudged a bankrupt and that no complaint objecting to the discharge of the bankrupt was filed within the time fixed by the court [*or* that a complaint objecting to discharge of the bankrupt was filed and, after due notice and hearing, was not sustained]; it is ordered that

1. The above-named bankrupt is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following:

(a) debts dischargeable under § 17a and b of the Bankruptcy Act;

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

(c) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clause (8) of § 17a of the Act, except those debts on which there was an action pending on the date when the petition was filed as specified above in which a right to jury trial existed and a party has either made a timely demand therefor or has submitted to this court a signed statement of intention to make such a demand;

(d) debts determined by this court to be discharged under § 17c (3) of the Act.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above-named bankrupt.

Dated: ....

....................................,
Bankruptcy Judge.

FORM No. 25

CAPTION FOR ADVERSARY PROCEEDING

United States District Court
for the .... District of ....

In re

................................, Bankruptcy No. ....
Bankrupt

................................,
Plaintiff

v.

................................,
Defendant

COMPLAINT [OR OTHER DESIGNATION]

FORM No. 26

SUMMONS AND NOTICE OF TRIAL OF ADVERSARY PROCEEDING

[*Caption, other than designation, as in Form No. 25*]

SUMMONS AND NOTICE OF TRIAL

To the above-named defendant:

You are hereby summoned and required to serve upon ...., plaintiff's attorney, whose address is ...., a motion or an answer* to the complaint which is herewith served upon you, on or before ...., and to file the motion or answer with this court not later than the second business day thereafter. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

You are hereby notified that trial of the proceeding commenced by this complaint has been set for ...., at .... o'clock ... m., in ....

.................................,
Bankruptcy Judge.

By: ....
Address: ....,
....

Date of issuance: ....

OFFICIAL FORM No. 27

SUBPOENA TO WITNESS

[*Caption, other than designation, as in Form No. 1 or No. 25*]

SUBPOENA TO WITNESS

To ....:

You are hereby commanded to appear at ...., on ...., at .... o'clock ... m., to testify in the above-entitled case [*or* adversary proceeding *or* contested matter] [*add if appropriate*] and to bring with you ....
....
....

Dated: ....

.................................,
Bankruptcy Judge.

---

*If you make a motion, as you may in accordance with Bankruptcy Rule 712, that rule governs the time within which your answer must be served.

FORM No. 28

NOTICE OF APPEAL TO A DISTRICT COURT FROM A JUDGMENT OR ORDER OF A REFEREE ENTERED IN ADVERSARY PROCEEDING

United States District Court
for the .... District of ....

In re

.............................., Bankruptcy No. ....
Bankrupt

..............................,
Plaintiff

v.

..............................,
Defendant

NOTICE OF APPEAL TO DISTRICT COURT

...., the plaintiff [*or* defendant *or other party*] appeals to the district court from the judgment [*or* order] of the referee entered in this case on ...., [*here describe the judgment or order appealed from*] ....

The parties to the judgment [*or* order] appealed from and the names and addresses of their respective attorneys are as follows: ....

Dated: ....

Signed: ....,
Attorney for Appellant.

Address: ....,
....

FORM No. 29

ORDER AND NOTICE FOR FINAL MEETING OF CREDITORS

[*Caption, other than designation, as in Form No. 1*]

ORDER FOR FINAL MEETING OF CREDITORS AND NOTICE OF FILING OF FINAL ACCOUNT[S] OF TRUSTEE [AND RECEIVER] AND OF FINAL MEETING OF CREDITORS [AND OF HEARING ON ABANDONMENT OF PROPERTY BY THE TRUSTEE]

To the creditors:

The final report[s] and account[s] of the trustee [*if appropriate:* and of the receiver] in this case having been filed, It is ordered, and notice is hereby given, that the final meeting of creditors will be held at ...., ..., on ...., at .... o'clock ... m., for the purpose [*as appropriate*] of examining and passing on the report[s] and account[s], acting on applications for allowances, and transacting such other business as may properly come before the meeting. Attendance by creditors is welcomed but not required.

The following applications for allowances have been filed:

Applicants	*Commissions or fees*	*Expenses*
....	$...........	$...........
Receiver		
....	$...........	$...........
Trustee		
....	$...........	$...........
Attorney for bankrupt		
....	$...........	$...........
Attorney for receiver		
....	$...........	$...........
Attorney for trustee		
....	$...........	$...........
Attorney for petitioning creditors		
....	$...........	$...........

Creditors may be heard before the allowances are determined.

The account of the trustee shows total receipts of $........... ...., and total disbursements of $...................... The balance on hand is $......................

In addition to expenses of administration as may be allowed by the court, liens and priority claims totaling $.................., must be paid in advance of any dividend to general creditors.

Claims of general creditors totaling $...................... have been allowed.

[*If appropriate*] The trustee's application to abandon the following property will be heard and acted upon at the meeting:

....

....

The bankrupt has [not] been discharged.

Dated: ....

.............................,
Bankruptcy Judge.

FORM NO. 30

REPORT OF TRUSTEE IN NO-ASSET CASE

[*Caption, other than designation, as in Form No. 1*]

REPORT OF TRUSTEE IN NO-ASSET CASE

To ...., Bankruptcy Judge:

..................................., of *...................., trustee of the estate of the above-named bankrupt, reports that he has neither received any property nor paid any money on account of this estate; that he has made diligent inquiry into the whereabouts of property belonging to the estate; and that there are no assets in the estate over and above the exemptions claimed by, and by him set aside to, the bankrupt.

Wherefore he prays that this report be approved, and that he be discharged from office.

Dated: ....

Signed: ....,
Trustee.

GENERAL ORDERS AND FORMS IN BANKRUPTCY TO BE ABROGATED

The following General Orders and Official Forms in Bankruptcy heretofore adopted by the Supreme Court are to be abrogated:

General Orders 1 to 7 inclusive, 9 to 12 inclusive, 14 to 26 inclusive, 28 to 40 inclusive, 42 to 45 inclusive, 47, 50, 51, 53, and 56.

Official Forms 1 to 47 inclusive, and 70 to 72 inclusive.

**State post-office address.*

RULES OF BANKRUPTCY PROCEDURE

TITLE VII

CHAPTER XIII RULES

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[illegible]

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[illegible]

TITLE VII

CHAPTER XIII RULES

Rule 13-1. Scope of Chapter XIII Rules and forms; short title.

The rules and forms in this Title VII govern the procedure in courts of bankruptcy in cases under Chapter XIII of the Bankruptcy Act. These rules may be known and cited as the Chapter XIII Rules. These forms may be known and cited as the Official Chapter XIII Forms.

Rule 13-2. Meanings of words in bankruptcy rules when applicable in Chapter XIII case.

The following words and phrases used in the Bankruptcy Rules made applicable in Chapter XIII cases by these rules have the meanings herein indicated, unless they are inconsistent with the context:

(1) "Bankrupt" means "debtor."

(2) "Bankruptcy" or "bankruptcy case" means "Chapter XIII case."

(3) "Receiver," "trustee," "receiver in bankruptcy," or "trustee in bankruptcy" means the "trustee" in the Chapter XIII case.

PART I. PETITION AND PROCEEDINGS RELATING THERETO

Rule 13-101. Commencement of Chapter XIII case.

A Chapter XIII case is commenced by filing a petition with the court seeking relief under Chapter XIII of the Act.

Rule 13-102. Reference of cases; withdrawal of reference and assignment.

(*a*) *Reference.*—Upon the filing of a petition the clerk shall refer the case forthwith to a referee or, if a local rule so provides, to more than one referee concurrently. Thereafter all proceedings in the case shall be before the referee except as otherwise provided by subdivision (b) of this rule, by Rule 13-407 (c), by Bankruptcy Rule 920, by § 2a (15) of the Act when a complaint seeks an injunction to restrain a court, by § 43c of the Act when the office of the referee is vacant, and by the provisions in the Act and Part VIII of the Bankruptcy Rules governing appeals from judgments of the referee.

(*b*) *Withdrawal of reference and assignment.*—The district judge may, at any time, for the convenience of parties or other cause, withdraw a case in whole or in part from a referee and either act himself or assign the case or part thereof to another referee in the district.

Rule 13-103. Original petition.

An original petition under Chapter XIII of the Act shall conform substantially to Official Form No. 13-1. An original and 2 copies of the petition shall be filed, unless a different number of copies is required by local rule.

Rule 13-104. Petition in pending bankruptcy case.

If a bankruptcy case is pending by or against the debtor, any petition under Chapter XIII shall be filed therein and may be filed before or after adjudication. Such petition shall conform substantially to Official Form No. 13-4. An original and 2 copies of the petition shall be filed, unless a different number of copies is required by local rule. The filing of the petition shall act as a stay of adjudication or of administration of the estate in bankruptcy. The Chapter XIII case shall be deemed originally commenced as of the date of the filing of the petition in the pending bankruptcy case.

Rule 13-105. Caption of petition.

The caption of every petition shall comply with Bankruptcy Rule 904 (b). In addition the caption shall include the name and social security number of the debtor and all other names used by him within 6 years before the filing of the petition.

Rule 13–106. Filing fees.

(*a*) *General requirement.*—Unless the petition is filed under Rule 13–104 and the filing fees have been paid or their payment in installments has been ordered pursuant to Bankruptcy Rule 107, and except as otherwise provided in subdivision (b), every petition shall be accompanied by the prescribed filing fees.

(*b*) *Payment of filing fees in installments.*

(*1*) *Application for permission to pay filing fees in installments.*—A petition shall be accepted for filing by the clerk of the district court if accompanied by an application signed by the petitioner for permission to pay all or a part of the filing fees in installments. The application shall state that the applicant is unable to pay the filing fees except in installments, the proposed terms of such installment payments, and that the applicant has paid no money and transferred no property to his attorney for services in connection with the Chapter XIII case or any pending bankruptcy case. The application shall be filed in duplicate, one copy for the clerk and one for the bankruptcy judge.

(*2*) *Action on application.*—At or prior to the first meeting of creditors, if any part of the filing fees remains unpaid, the court after a hearing may make an order permitting payment of the filing fees in installments under the plan or otherwise to the clerk of the district court, and fixing the number of installments and the amount and date of payment of each installment. The number of installments permitted shall not exceed 4, and the final installment shall be payable not later than 4 months after the filing of a petition under Rule 13–103 or Rule 13–104. For cause shown, however, the court may extend the time for payment of any installment to a date not later than 6 months after the date of filing of such petition.

(*3*) *Postponement of attorney's fees.*—Where payment of filing fees in installments is authorized the debtor shall make no payment and transfer no property to his attorney. Any award of compensation to the attorney for services in connection with the Chapter XIII case or any pending bankruptcy case shall be governed by Bankruptcy Rule 219 and shall be paid pursuant to Rule 13–309.

Rule 13–107. Chapter XIII statement.

(*a*) *Chapter XIII statement required.*—The debtor shall file with the court a Chapter XIII Statement prepared in the manner prescribed by Official Form No. 13–5. The number of copies of the statement shall correspond to the number of copies of the petition required by these rules.

(*b*) *Time limits.*—The Chapter XIII Statement shall be filed with the petition or within 10 days thereafter. On application, the court may grant up to 10 additional days for filing the statement; any further extension may be granted only for cause shown and on such notice as the court may direct.

Rule 13–108. Verification of petitions and Chapter XIII statements.

All petitions, Chapter XIII Statements, and amendments thereto shall be verified.

Rule 13–109. Amendments of petitions and Chapter XIII statements.

A petition or a Chapter XIII Statement may be amended as a matter of course at any time before the case is closed. The court may, on application or motion of any party in interest or on its own initiative, order any petition or statement to be amended. Every amendment under this rule shall be filed in the same number as required of the original paper, and the court shall give notice of the amendment to such persons as it may designate.

Rule 13–110. Venue and transfer.

(*a*) *Proper venue.*

(*1*) *Single petitions.*—A single petition may be filed pursuant to Rule 13–103 in the district where the petitioner has his principal place of employment, residence, or domicile. A single petition filed pursuant to Rule 13–104 shall be filed with the court in which the bankruptcy case is pending.

(*2*) *Joint petitions.*—A joint petition authorized by Rule 13–111 (a) and filed pursuant to Rule 13–103 may be filed in a district of proper venue for either petitioner under paragraph (1) of this subdivision. A joint petition authorized by Rule 13–111 (a) and filed pursuant to Rule 13–104 may be filed in a court in which either petitioner is a bankrupt in a pending bankruptcy case.

(*b*) *Transfer of cases; dismissal or retention when venue improper.*

(*1*) *When venue proper.*—Although a petition is filed in accordance with subdivision (a) of this rule, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, in the interest of justice and for the convenience of the parties, transfer the case to any other district. The transfer may be ordered at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.

(*2*) *When venue improper.*—If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the foregoing, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

(*c*) *Procedure when petitions involving the same debtor are filed in different courts.*—If petitions commencing Chapter XIII cases or a Chapter XIII case and any other case under the Act are filed in different districts, by or against the same debtor, the court in which the first petition is filed shall, after hearing on motion and notice to the petitioners and such other persons as the court may designate, determine the court in which the case should proceed as a Chapter XIII case in the interest of justice and for the convenience of the parties. The proceedings on the other petitions shall be stayed by the courts in which such petitions have been filed until such determination is made. Thereafter all the courts in which petitions have been filed shall proceed in accordance with the determination.

(*d*) *Reference of transferred cases.*—A case transferred under this rule shall, in accordance with Rule 13–102 (a), be referred by the clerk of the district court to which it has been transferred.

Rule 13–111. Joint proceedings of husband and wife.

(*a*) *Joint petitions.*—A husband and wife eligible to file single petitions may file a joint petition pursuant to Rule 13–103 or, if a petition in bankruptcy has been filed by or against either or both of them, in a pending bankruptcy case pursuant to Rule 13–104.

(*b*) *Joint administration.*—If a joint petition is filed pursuant to subdivision (a) of this rule the court shall, or if single petitions by a husband and wife are pending in the same court, the court may order a joint administration of the estates and, while protecting the rights of the parties under the Act, may make such other orders, including the appointment of a single trustee, as may tend to avoid unnecessary costs and delay.

Rule 13–112. Dismissal or conversion to bankruptcy without confirmation of plan; evidence of title.

(*a*) *Voluntary dismissal or conversion to bankruptcy;*

dismissal or conversion for want of prosecution, nonpayment of filing fees, or denial of confirmation.—On application of the debtor to dismiss the case or to convert it to bankruptcy at any time prior to confirmation, or for want of prosecution or nonpayment of any installment of the filing fees as ordered pursuant to Rule 106 and after hearing on notice to the debtor, or if no plan is confirmed, the court shall—

(1) if the petition was filed pursuant to Rule 13–104, enter an order directing that the bankruptcy case proceed; or

(2) if the petition was filed pursuant to Rule 13–103, enter an order dismissing the case or, with the written consent of the debtor, enter an order adjudicating him a bankrupt.

(*b*) *Distribution of payments.*—If a case is dismissed under this rule without payment in full of the filing fees, any payments made shall be distributed in the same manner and proportions as if the filing fees had been paid in full.

(*c*) *Notice of dismissal to creditors.*—Promptly after entry of an order of dismissal under this rule, notice thereof shall be given to creditors in the manner provided in Rule 13–203. To enable the court to give such notice, the debtor, if he has not already filed a Chapter XIII Statement, shall file a list of all his creditors with their addresses within the time fixed by the court. If the debtor fails to file such list the court may by order provide for the preparation of the list in such manner as may be appropriate.

(*d*) *Effect of dismissal.*—Unless the order specifies to the contrary, dismissal of a case under this rule is without prejudice. A certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to his property.

PART II. PLAN AND PROCEEDINGS RELATED THERETO; NOTICES TO CREDITORS; CREDITORS' MEETINGS; TRUSTEES; EXAMINATIONS; ATTORNEYS AND ACCOUNTANTS

Rule 13–201. Filing of plan.

(*a*) *Time for filing plan; identification of plans.*—The debtor may file a plan with his petition. If a plan is not filed with the petition it shall be filed within 10 days thereafter and such time shall not be further extended except for cause shown and on such notice to such persons as the court may direct. Each plan filed and any other plans for which acceptances of creditors are solicited must be appropriately identified.

(*b*) *Provision of copies.*—The debtor, if required by the court, shall promptly furnish a sufficient number of copies to enable the court to include a copy of the plan with each notice of the first meeting of creditors pursuant to Rule 13–204 (a)(1).

Rule 13–202. Acceptance or rejection of plan.

(*a*) *Time for acceptance or rejection; effect of failure to accept or reject.*—At any time prior to the conclusion of the first meeting of creditors each creditor filing a claim may file with the court his acceptance or rejection of the plan or summary thereof which accompanies the notice of first creditors' meeting and, upon failure to do so, any creditor filing a claim shall be deemed to have accepted such plan. For cause shown at any time before the court determines that the plan or any modification thereof has been accepted by the number and amount of creditors required for confirmation, the court may allow any creditor who has filed an acceptance or a rejection to change or withdraw it. An acceptance or rejection may be included in a creditor's proof of claim. Acceptances may be obtained by the debtor before or after the filing of the petition and may be filed by him with the court on behalf of the accepting creditors.

(*b*) *Form of acceptance or rejection.*—An acceptance or rejection of a plan shall be in writing, shall identify the plan accepted or rejected, and shall be signed by the creditor.

(*c*) *Acceptance or rejection by partially secured creditor.*—A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan in both capacities unless his secured claim is not dealt with by the plan, in which event he shall be entitled to accept or reject only as an unsecured creditor.

Rule 13–203. Notices to creditors and the United States.

(*a*) *Ten-day notices to all creditors.*—Except as provided in subdivision (e) of this rule, the court shall give all creditors, including creditors secured by estates in real property or chattels real, at least 10 days' notice by mail of (1) a meeting of creditors and (2) the hearing on confirmation of a plan.

(*b*) *Other notices to all creditors.*—The court shall give notice by mail to all creditors, including creditors secured by estates in real property or chattels real, of (1) the dismissal of the case pursuant to Rule 13–112 or 13–215; (2) the time fixed, if any, for filing rejections of a modification of a plan pursuant to Rule 13–212; (3) the time fixed, if any, for filing a complaint objecting to the debtor's discharge pursuant to Rule 13–404 (b)(1); (4) the order of discharge as provided in Rule 13–404 (e); (5) the waiver, denial, or revocation of a discharge as provided in Rule 13–406; and (6) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c (2) of the Act as provided in Rule 13–407 (a)(2).

(*c*) *Addresses of notices.*—All notices to which a creditor is entitled under these rules shall be addressed to the creditor as he or his duly authorized agent may direct in a request filed with the court or delivered to the trustee; otherwise, to the creditor at the address shown in the Chapter XIII Statement or, if a different address is stated in a proof of claim duly filed, then at the address so stated.

(*d*) *Notices to the United States.*—Copies of notices required to be mailed to all creditors under these rules shall be mailed (1) to the district director of internal revenue for the district in which the case is pending and (2) whenever the Chapter XIII Statement or any other paper filed in the case discloses a debt to the United States other than one for taxes, to the United States attorney for the district in which the case is pending and, if disclosed by the filed papers, to the department, agency or instrumentality of the United States through which the debtor became so indebted.

(*e*) *Notice by publication.*—If the court finds that it is impracticable to give notice to creditors by mail as provided in this rule or that it is desirable to supplement such notice, the court may order publication thereof.

(*f*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 13–105.

Rule 13–204. Meetings of creditors.

(*a*) *First meeting.*

(*1*) *Date and place.*—Promptly after the filing of a plan the court shall call a first meeting of creditors, but if there is an application or motion to dismiss or to convert to bankruptcy under Rule 13–112, or an appeal from or a motion to vacate an order entered under that rule, the court may delay fixing a date for such meeting. A copy or a summary of the last filed plan and a form of proof of claim containing provision for acceptance or rejection of the plan shall accompany the notice of the meeting. The notice shall state that any secured claim not filed on or before the first date set for the first meeting of creditors or within such extended time as the court may fix will not be treated as a secured claim for purposes of voting and distribution and that any creditor filing a claim who has not filed a written acceptance or rejection of the plan pursuant to Rule 13-202 prior to the conclusion of the first meeting of creditors shall be deemed to have accepted the plan. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

(*2*) *Agenda.*—The bankruptcy judge shall preside over the transaction of all business at the first meeting of creditors, including the examination of the debtor. He shall, when necessary, allow and disallow claims, determine which claims are unsecured and which are secured and to what extent, which claims have voted for and against acceptance of the plan, and may rule on confirmation of the plan pursuant to Rule 13-213 if notice of the hearing on confirmation was included in the notice of the meeting.

(*b*) *Special meetings.*—The court may call a special meeting of creditors on application or on its own initiative.

Rule 13-205. Appointment and qualification of trustees.

(*a*) *Standing trustees.*

(*1*) *Appointment.*—Whenever in their judgment the number of Chapter XIII cases is sufficient to make such appointment feasible, the referees shall appoint one or more standing trustees to whom all Chapter XIII cases shall be assigned without further order. The referees may terminate the appointment of a standing trustee at any time.

(*2*) *Qualification.*—Every standing trustee shall, before entering upon the performance of his official duties and within 5 days after his appointment or within such further time as the referees may permit, qualify by filing a blanket bond in favor of the United States, conditioned on the faithful performance of his official duties in all cases. Unless otherwise provided by local rule, the order appointing the standing trustee, the bond, and the order approving the bond, shall be filed with the clerk of the court.

(*b*) *Appointment of trustee where no standing trustee.*

(*1*) *Appointment.*—Where no standing trustee has been appointed, or in any case for cause shown, the court shall appoint a trustee at the time of, or prior to, confirmation of a plan, and shall immediately notify the trustee of his appointment. The court shall also inform him as to how he may qualify, including the penal sum of his bond, if required, and shall require him forthwith to notify the court of his acceptance or rejection of the office.

(*2*) *Qualification.*—Every trustee appointed under this subdivision (b) shall, before entering upon the performance of his official duties and within 5 days after his appointment, qualify by filing a bond in favor of the United States, conditioned on the faithful performance of his official duties, or by giving such other security as may be approved by the court. The court may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by a trustee in more than one case or by more than one trustee. A trustee for whom a blanket bond has been filed shall qualify by filing his acceptance of his appointment in lieu of the bond. Unless otherwise provided by local rule, a bond given under this subdivision (b) shall be filed with the referee.

(*c*) *Amount of bond and sufficiency of surety.*—The referees appointing a standing trustee under subdivision (a) of this rule shall determine the amount of his bond and the sufficiency of his sureties or may authorize the bond to be secured by securities designated in Title 6, U. S. C., § 15, which securities shall be deposited in the custody of a Federal Reserve Bank or branch thereof designated by the referees and shall be subject to the order of the referees. The court shall determine the amount of the bond and the sufficiency of the surety for each bond filed under subdivision (b) of this rule.

(*d*) *Eligibility.*—A trustee shall have no interest adverse to the estate and shall be competent to perform the duties of his office. If an individual, he shall have a residence or office in the state in which the court appointing him sits or in any adjacent state, and, if a corporation, it shall be authorized by its charter or by law to act as trustee and have an office in the state in which the court appointing it sits.

(*e*) *Proceeding on bond.*—A proceeding on the bond of a trustee may be brought by any party in interest in the name of the United States for the use of the person injured by the breach of the condition. No proceeding shall be brought on a trustee's bond more than 2 years after his discharge in a particular case.

(*f*) *Evidence of qualification.*—Whenever evidence of the qualification of a standing trustee or any other trustee who has filed a blanket bond is required, the court may certify that he has been designated as a trustee in a particular case. Such a certificate, or a certified copy of the order approving the bond or other security given by any other trustee under this rule, shall constitute conclusive evidence of his appointment and qualification.

Rule 13–206. Examination.

(*a*) *Examination on Application.*—Upon application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless a local rule otherwise provides.

(*b*) *Examination of debtor at first meeting.*—At the first meeting of creditors, the court shall publicly examine the debtor or cause him to be examined and may permit any party in interest to examine the debtor.

(*c*) *Bankruptcy judge to preside.*—The bankruptcy judge shall preside at any examination under subdivision (b) of this rule.

(*d*) *Scope of examination.*—The examination under subdivisions (a) and (b) of this rule may relate only to the acts, conduct, or property of the debtor, or to any matter which may affect the administration of the debtor's estate, or to his right to discharge.

(*e*) *Compelling attendance for examination and production of documentary evidence.*—The attendance of any person for examination and the production of documentary evidence may be compelled in accordance with the provisions of Bankruptcy Rule 916 by the use of a subpoena for a hearing or trial.

(*f*) *Place of examination of debtor.*—Without issuing a subpoena, the court may for cause shown and on such terms as it may impose order the debtor to be examined under subdivision (a) of this rule at any place it designates, whether within or without the district wherein the case is pending.

(*g*) *Mileage.*—A person other than a debtor shall not be required to attend as a witness under this rule unless his lawful mileage and fee for one day's attendance shall be first tendered to him. If the debtor resides over 100 miles from the place of examination when he is required to appear for an examination under subdivision (a) of this rule, he shall be tendered mileage allowed by law to a witness for any distance over 100 miles from his residence at the date of the filing of the first petition commencing a case under the Act, or his residence at the time he is required to appear for examination, whichever is the lesser.

Rule 13-207. Employment and compensation and reimbursement of attorneys and accountants governed by bankruptcy rules.

The employment of attorneys and accountants for the trustee and the authorization of the trustee to act as an attorney or accountant for the estate shall be governed by Bankruptcy Rule 215. The compensation and reimbursement of expenses of such an attorney or accountant for an estate and the compensation and reimbursement of the debtor's attorney shall be governed by Bankruptcy Rule 219.

Rule 13–208. Duty of trustee to keep records, make reports, and furnish information.

A trustee shall: (1) file a complete inventory of the property of the debtor if and as the court directs; (2) keep a detailed record of all receipts, including the source or other identification of each receipt, and of all disbursements; (3) forthwith file with the court notices of creditors' addresses delivered to the trustee pursuant to Rule 13–203 (c); (4) furnish information concerning the estate and its administration when reasonably requested by a party in interest, except as otherwise directed by the court; and (5) file a final report and account containing or incorporating by reference a detailed statement of receipts and disbursements.

Rule 13–209. Compensation or reimbursement of trustees.

(*a*) *Application for compensation or reimbursement.*—A trustee, other than a standing trustee, seeking compensation for services and any trustee seeking reimbursement of necessary expenses from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred and (2) the amounts requested. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required.

(*b*) *Factors in allowing compensation.*—The compensation allowable by the court to a standing or other trustee for services rendered in the administration of the debtor's estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of the creditors. The compensation allowed by the Act to a standing or other trustee shall be in full compensation for the services performed by him as required by the Act and by these rules, but shall not be deemed to cover expenses necessarily incurred in the performance of his duties and allowed upon the settlement of his accounts. Additional compensation may be allowed for legal or other services not required of him by the Act or by these rules, but only if such services were authorized by order of the court before they were rendered.

(*c*) *Restriction on sharing of compensation.*—Except as herein provided, a standing or other trustee rendering services in a Chapter XIII case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him from the estate for such services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation as trustee with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 13-210 to which he is a party, or may enter such other order as may be appropriate.

Rule 13–210. Examination of debtor's transactions with his attorney.

(*a*) *Disclosure of compensation paid or promised to attorney for debtor.*—Every attorney for a debtor, whether or not he applies for compensation, shall file with the court on or before the first date set for the first meeting of creditors, or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for sharing of his compensation with a member or regular associate of his law firm shall not be required.

(*b*) *Payment or transfer to attorney in contemplation of bankruptcy or Chapter XIII case.*—On motion by any party in interest, or on the court's own initiative, the court may examine any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Act by or against him, to an attorney for services rendered or to be rendered.

(*c*) *Payment or transfer to attorney, or agreement therefor, after case commenced.*—On motion by any party in interest, or on the court's own initiative, the court may examine any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after the filing of the first petition commencing a case under the Act, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to such case.

(*d*) *Invalidation of unreasonable payment, transfer, or obligation.*—Any payment, transfer, or obligation examined under subdivision (b) or (c) of this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The amount of any excess found to have been paid or transferred under subdivision (b) or (c) may be recovered and returned to the debtor and any obligation found to be excessive under subdivision (c) may be cancelled to the extent of the excess.

Rule 13–211. Removal of trustee; substitution of successor.

(*a*) *Removal for cause.*—On application of any party in interest or on the court's own initiative and after hearing on notice, the court may remove a trustee from a case for cause and appoint a successor.

(*b*) *Substitution of successor.*—When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a Chapter XIII case, his successor is automatically substituted as a party in any pending action, proceeding, or matter without abatement.

Rule 13–212. Modification of plan before confirmation.

The debtor may file a modification of the plan which accompanies, or a summary of which accompanies, the notice of the first meeting of creditors at any time before the plan is confirmed. The debtor may also submit with the modification written acceptances thereof by creditors. If the court finds that the modification does not materially and adversely affect the interest of any creditor who has not in writing accepted it, the modification shall be deemed accepted by all creditors who have accepted or are deemed to have accepted the plan. Otherwise, the court shall enter an order that the plan as modified shall be deemed to have been accepted by any creditor who accepted or is deemed to have accepted the plan and who fails to file with the court within such reasonable time as shall be fixed in the order a written rejection of the modification. Notice of such order, accompanied by a copy or a summary of the proposed modification, shall be given to creditors in the manner specified in Rule 13–203 and to other parties in interest at least 10 days before the time fixed in such order for filing rejections of the modification. The debtor shall, if required by the court, furnish a sufficient number of copies of the modification to enable the court to transmit a copy with each such notice.

Rule 13–213. Confirmation of plan; payment order; evidence of title.

(*a*) *Confirmation of plan.*—After hearing on notice to the debtor and to all creditors in the manner specified in Rule 13–203, which hearing may occur at the first meeting of creditors, the court shall rule on confirmation of the plan unless, for cause shown, the court grants a reasonable extension of time for filing written objections to confirmation and sets a later date for hearing on confirmation. Objections to confirmation of the plan may be filed in writing at any time prior to confirmation. An objection to confirmation on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt is governed by Part VII of the Bankruptcy Rules. Any other objection is governed by Bankruptcy Rule 914. If no objection is timely filed the court may find, without taking proof, that the debtor has not committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt and that the plan has been proposed and its acceptance procured in good faith and not by any means, promises, or acts forbidden by law. An order of confirmation shall substantially comply with Official Form No. 13–15.

(*b*) *Payment order.*—An order of confirmation or a separate payment order shall specify, if not specified in the confirmed plan, the amount of payments to be made under the plan and shall specify either the manner in which such payments are to be made by the debtor or the manner in which such payments are to be obtained from the employer of the debtor. Such order directed to an employer may be enforced or implemented in the manner provided for the enforcement of judgments or, in an appropriate case, by injunction or contempt proceedings.

(*c*) *Evidence of title.*—A certified copy of the plan, and of the order confirming the plan, shall constitute conclusive evidence of the revesting of the debtor's title to his property.

Rule 13–214. Modification of plan after confirmation; revocation of confirmation.

(*a*) *Modification of plan after confirmation.*—At any time during the period of a confirmed plan providing for extension, on application of any party in interest and after hearing on notice to such parties as the court may designate, the court may increase or reduce the amount of any of the installment payments provided for by the plan or extend or shorten the time for such payments, or otherwise modify the confirmation or payment order, where it finds that the circumstances of the debtor so warrant or require, or may alter the amount of the distribution to any creditor provided for by the plan to the extent necessary to take account of any payment to or satisfaction of such creditor outside the plan.

(*b*) *Revocation of confirmation.*—Any party in interest may, at any time within 6 months after a plan has been confirmed, file a complaint pursuant to the Act to revoke the confirmation as procured by fraud. When such a complaint is filed the court shall reopen the case if necessary and conduct a hearing on notice to all parties in interest. The procedure shall be governed by Part VII of the Bankruptcy Rules. If the confirmation is revoked—

(1) The court may dispose of the case pursuant to subdivision (a) of Rule 13–215; or

(2) The court may receive proposals of the debtor to modify the plan. Thereafter, the procedure for modifica-

tion and for confirmation of a plan as modified shall follow Rules 13–212 and 13–213, except that acceptance of the plan shall not be required by any creditor who has participated in the fraud and such creditor shall not be counted in determining the number and amount of the claims of creditors whose acceptance is required. If a modified plan is not confirmed, the court shall dispose of the case pursuant to subdivision (a) of Rule 13–215.

Rule 13–215. Dismissal or conversion to bankruptcy after confirmation of plan.

(*a*) *Voluntary dismissal or conversion to bankruptcy after confirmation; dismissal or conversion for default or upon revocation of confirmation or termination of plan.*—After confirmation, (A) on application of the debtor to dismiss the case or to convert it to bankruptcy, or (B) on application of any party in interest if a debtor defaults in any of the terms of the plan or in the payment of any installment of the filing fees due after confirmation, or if confirmation is revoked for fraud and a modified plan is not confirmed pursuant to Rule 13–214 (b)(2), or if the plan terminates by reason of the happening of a condition specified therein, the court shall reopen the case if necessary and—

(1) if the petition was filed pursuant to Rule 13–103 and if confirmation has been revoked for fraud chargeable to the debtor, the court shall enter an order dismissing the case or adjudicating the debtor a bankrupt; or

(2) in any other case in which the petition was filed pursuant to Rule 13–103, the court shall enter an order dismissing the case or, with the written consent of the debtor, shall enter an order adjudicating him a bankrupt; or

(3) in any case in which the petition was filed pursuant to Rule 13–104, the court shall enter an order directing that the bankruptcy case proceed.

(b) If a case is dismissed under this rule without payment in full of the filing fees, any payments made shall be distributed in the same manner and proportions as if the filing fees had been paid in full.

(*c*) *Notice of dismissal to creditors.*—Promptly after entry of an order of dismissal under this rule, notice thereof shall be given to creditors in the manner provided in Rule 13–203.

(*d*) *Effect of dismissal.*—Unless the order specifies to the contrary, dismissal of a case under this rule on the ground of fraud is with prejudice and dismissal on any other ground is without prejudice. A certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to his property.

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS

Rule 13–301. Proof of claim.

(*a*) *Form and content; who may execute.*—A proof of claim shall consist of a statement in writing setting forth a creditor's claim and setting forth facts showing that such claim is free from any charge forbidden by applicable law. Except as provided in Rules 13–303 and 13–304, a proof of claim shall be executed by the creditor or by his authorized agent. Except as provided in Rule 13–303, a proof of claim shall conform substantially to Official Form No. 13–9.

(*b*) *Evidentiary effect.*—A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim, but any creditor may be required by the court to establish, by affidavit or in such other manner as the court may require before allowance of the claim, that it is free from any charge forbidden by applicable law.

Rule 13–302. Filing proof of claim.

(*a*) *Manner of filing.*—In order for his claim to be allowed, every creditor, including the United States, any state, or any subdivision thereof, must file a proof of claim in accordance with this rule, except as provided in Rules 13–303, 13–304, and 13–305.

(b) *Place of filing.*—A proof of claim shall be filed in the place prescribed by Bankruptcy Rule 509.

(*c*) *Claim founded on a writing; perfection of security interests.*—When a claim, or an interest in property of the debtor securing the claim, is founded on a writing, the original or a duplicate shall be filed with the proof of claim unless the writing has been lost or destroyed. If lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim. If a security interest is claimed, the proof of claim shall be accompanied by satisfactory evidence that the security interest has been perfected.

(*d*) *Transferred claim.*

(*1*) *Unconditional transfer before proof filed.*—If a claim has been unconditionally transferred before proof of the claim has been filed, the proof of such claim may be filed only by the transferee. If such claim has been transferred after the filing of the first petition commencing a case under the Act, it shall be supported by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor or (B) a statement of the transferee why it is impossible to obtain such a statement from the transferor.

(*2*) *Unconditional transfer after proof filed.*—If a claim has been unconditionally transferred after proof thereof has been filed, proof of the terms of the transfer shall be filed, and the court shall immediately notify the original claimant by mail of the filing of such proof of transfer and that objection thereto, if any, must be made within 10 days of the mailing of the notice or within such further time as the court may allow. If the court finds, after hearing if necessary, that the claim has been unconditionally transferred, it shall make an order substituting the transferee for the original claimant.

If it does not so find, the court shall make such order as may be appropriate.

(*3*) *Transfer of claim for security before proof filed.*—If a claim has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer and, if the claim was so transferred after the filing of the first petition commencing a case under the Act, by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor, or (B) a statement of the transferee why it is impossible to obtain such a statement from the transferor. If either the transferor or the transferee files a proof of claim, the court shall immediately notify the other by mail that he may join in the claim so filed. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. After hearing if necessary, the court shall make such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the plan and in the administration of the estate as may be appropriate.

(*4*) *Transfer of claim for security after proof filed.*—If a claim has been transferred for security after proof thereof has been filed, proof of the terms of the transfer shall be filed, and the court shall immediately notify the original claimant by mail of the filing of such proof of transfer and that objection thereto, if any, must be made within 10 days of the mailing of the notice or within such further time as the court may allow. After hearing if necessary, the court shall make such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the plan and in the administration of the estate as may be appropriate.

(*e*) *Time for filing.*

(*1*) *Secured claims.*—A secured claim, whether or not listed in the Chapter XIII Statement, must be filed on or before the first date set for the first meeting of creditors in the Chapter XIII case unless the court, on application before the expiration of that time and for cause shown, shall grant a reasonable, fixed extension of time. Any claim not properly filed by the creditor within such time shall not be treated as a secured claim for purposes of voting and distribution in the Chapter XIII case.

(*2*) *Unsecured claims.*—Unsecured claims, whether or not listed in the Chapter XIII Statement, must be filed within 6 months after the first date set for the first meeting of creditors in the Chapter XIII case, except as follows:

(A) On application before the expiration of such period and for cause shown, the court may grant a reasonable, fixed extension of time for the filing of a claim by the United States, a state, or a subdivision thereof.

(B) In the interest of justice the court may grant an infant or incompetent person without a guardian up to an additional 6 months for filing a claim.

(C) A claim which arises in favor of a person or becomes allowable because of a judgment for the recovery of money or property from such person or because of a judgment denying or avoiding a person's interest in property may be filed within 30 days after such judgment becomes final, but if the judgment imposes a liability which is not satisfied, or a duty which is not performed, within such period or such further time as the court may permit, the claim shall not be allowed.

(*f*) *Claims filed in superseded bankruptcy case.*—Where the petition is filed pursuant to Rule 13–104, all claims filed in the superseded bankruptcy case shall be deemed filed in the Chapter XIII case if amended, within the time specified in subdivision (e)(1) of this rule for secured claims, or within the time specified in subdivision (e)(2) of this rule for other claims, as appropriate, to conform to paragraph 4 of Official Form No. 13–9 or No. 13–10, as appropriate.

Rule 13-303. Filing of claims by debtor or trustee.

If a creditor fails to file his claim on or before the first date set for the first meeting of creditors in the Chapter XIII case, the debtor or the trustee may execute and file a proof of such claim on Official Form No. 13-10 in the name of the creditor. Such claim shall be treated as a filed claim only for purposes of allowance and distribution. The court shall forthwith mail notice of such filing to the creditor and to the debtor if the claim is filed by the trustee, or to the trustee if the claim is filed by the debtor. The creditor may nonetheless file a proof of claim pursuant to Rule 13-302, which proof when filed shall supersede the proof filed by the debtor or trustee.

Rule 13-304. Claim by codebtor.

A person who is or may be liable with the debtor, or who has secured a creditor of the debtor, may, if the creditor fails to file his claim on or before the first date set for the first meeting of creditors, file a proof of claim pursuant to Rule 13-302, including an acceptance or rejection of the plan or any modification thereof, in the name of the creditor, if known, or if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of the distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 13-302 and, at any time before the court determines that the plan or any modification thereof has been accepted by the number and amount of creditors required for confirmation, an acceptance or rejection of the plan or any modification thereof. Such proof of claim and such acceptance or rejection shall supersede the proof of claim and the acceptance or rejection filed pursuant to the first sentence of this rule. In the event the creditor files a claim and does not file a timely acceptance or rejection of the plan, any acceptance or rejection filed by the codebtor shall be deemed made on the creditor's behalf.

Rule 13–305. Post-petition claims.

Notwithstanding Rule 13–302 (e), the court may at any time while a case is pending permit the filing of a proof of claim for the following:

(1) Claims for taxes owing to the United States, or to any state, or any subdivision thereof, at the time of the filing of the petition under Rule 13–103 or 13–104 which had not been assessed prior to the date of confirmation of the plan, but which are assessed within one year after the date of the filing of such petition.

(2) Claims for taxes owing to the United States, or to any state, or any subdivision thereof, after the filing of the petition under Rule 13–103 or 13–104 and which are assessed while the case is pending; and

(3) On such terms as the court may prescribe, claims incurred by the debtor after the filing of a petition under Rule 13–103 or 13–104 for property or services needed to assure proper performance under the plan by the debtor, provided that, when feasible, prior court approval of the incurring of the claim has been obtained.

Rule 13–306. Withdrawal of claim.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding, or the court has directed him to establish that the claim is free from any charge forbidden by law, or the creditor has accepted the plan or otherwise has participated significantly in the case or has received a dividend, he may not withdraw the claim save on application or motion with notice to the debtor and trustee, and on order of the court containing such terms and conditions as the court deems proper.

Rule 13–307. Objections to and allowance of claims; valuation of security.

(*a*) *Trustee's and debtor's duty to examine and object to claims.*—The trustee and the debtor shall examine proofs of claim and the trustee shall object to the allowance of improper claims, unless no purpose would be served thereby.

(*b*) *Allowance when no objection made.*—Subject to the provisions of subdivision (d) of this rule, a claim filed in accordnace with Rule 13–302, 13–303, or 13–304 shall be deemed allowed unless objection is made by a party in interest or unless the court directs the creditor to establish that the claim is free from any forbidden charge pursuant to Rule 13–301 (b).

(*c*) *Objection to allowance.*—An objection to the allowance of a claim shall be in writing. A copy of the objection and notice of a hearing thereon shall be mailed or delivered to the claimant, the trustee, and the debtor. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 13–701, the proceeding thereby becomes an adversary proceeding.

(*d*) *Secured claims.*—If a secured creditor files a claim, the value of the security interest held by him as collateral for his claim shall be determined by the court. The claim shall be allowed as a secured claim to the extent of the value so determined and as an unsecured claim to the extent it is enforceable for any excess of the claim over such value. For the purposes of this subdivision the court may appoint an appraiser in the manner specified by and subject to the limitations of Bankruptcy Rule 606.

Rule 13–308. Reconsideration of claims.

Within 10 days of the entry of an order allowing or disallowing a claim against the estate, a party in interest may move for reconsideration. If the motion is granted, the court may after hearing on notice make such further order as may be appropriate.

Rule 13–309. Priority payments; dividends; surplus funds.

(*a*) *Priorities.*

(*1*) *First payment.*—In advance of or at the time of payment of the first dividend to creditors under the plan there shall be paid, out of money paid in by or for the debtor, in the following order:

(A) any installment of filing fees ordered to be paid pursuant to Rule 13–106 (b)(2) and then due under such order;

(B) the actual and necessary costs and expenses incurred by the trustee;

(C) the additional fee prescribed for the referees' salary and expense fund and the trustee's commission;

(D) a reasonable fee to the attorney for the debtor for professional services actually theretofore rendered by such attorney in connection with the Chapter XIII case;

(E) where the petition is filed pursuant to Rule 13–104, the costs and expenses of administration and the fees of the superseded bankruptcy case;

(F) other debts entitled to priority under, and in the order prescribed by, § 64a of the Act.

(*2*) *Subsequent payments.*—In advance of or at the time of payment of any subsequent dividend to creditors there shall be paid, out of money paid in by or for the debtor, in the following order:

(A) any installment of filing fees ordered to be paid pursuant to Rule 13–106 (b)(2) and then due under such order;

(B) any actual and necessary costs and expenses incurred by the trustee and not previously paid;

(C) the additional fee prescribed for the referees' salary and expense fund and the trustee's commission, to the extent that either has not been previously paid;

(D) a reasonable fee to the attorney for the debtor for professional services actually theretofore rendered by such attorney in connection with the Chapter XIII case and not previously paid.

(*3*) *Waiver.*—A person entitled to priority of payment under paragraph (1) or (2) of this subdivision (a) may waive such priority by failing to reject a plan providing for such waiver within the time specified in Rule 13-202 (a) or by other waiver, but any other payment which such person receives in lieu thereof must be provided for in the plan or otherwise approved by the court.

(*b*) *Dividends.*

(*1*) *Payment.*—Except as otherwise provided in the plan, dividends to creditors shall be paid as promptly as practicable in such amounts and at such times as the court may order. Dividend checks shall be made payable and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Bankruptcy Rule 910. In that event, unless a local rule or court order provides otherwise, dividend checks shall be made payable to the creditor and to such other person and shall be mailed to such other person.

(*2*) *Small dividends.*—The court may by local rule or order direct that no dividend for less than $15 shall be distributed by the trustee to any creditor, but dividends not distributed because of such rule or order shall accumulate and shall be paid whenever such accumulation aggregates $15. Any accumulated balance shall be paid with the final dividend.

(*c*) *Surplus funds.*—Except as provided in Rule 13-310, any funds remaining in the estate on consummation of the plan shall be returned to the debtor.

Rule 13-310. Unclaimed funds.

Sixty days after the distribution of the final dividend, the trustee shall stop payment of all checks then unpaid and file with the clerk of the district court a list of the names and addresses, so far as known, of the persons entitled to such payments and the amounts thereof. The unclaimed funds shall thereupon be deposited in the registry of the United States district court and shall be withdrawn as provided in Title 28, U. S. C., § 2042.

PART IV. THE DEBTOR: DUTIES AND BENEFITS

Rule 13–401. Petition as automatic stay of actions against debtor and of lien enforcement.

(*a*) *Stay of actions and lien enforcement.*—A petition filed under Rule 13–103 or Rule 13–104 shall operate as a stay of the commencement or continuation of any action against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding for the purpose of rehabilitation of the debtor or the liquidation of his estate.

(*b*) *Duration of stay.*—Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision (d), (e) or (f) of this rule, the stay shall continue until the case is closed, dismissed, or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(*c*) *Annulment of stay.*—At the expiration of 30 days after the first date set for the first meeting of creditors, the stay provided by this rule other than a stay against lien enforcement shall be deemed annulled as against any creditor whose claim has not been listed in the Chapter XIII Statement and who has not filed his claim by that time.

(*d*) *Relief from stay.*—On the filing of a complaint by a creditor who has timely filed his claim or who is secured by an estate in real property or chattels real seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay.

A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(*e*) *Ex parte relief from stay.*—Upon the filing of a complaint by a creditor who has timely filed his claim or who is secured by an estate in real property or chattels real seeking relief from a stay provided by this rule against any act or the commencement or continuation of any court proceeding to enforce any lien, or any proceeding for the purpose of rehabilitation of the debtor or liquidation of his estate, relief may be granted without written or oral notice to the trustee or the debtor if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the trustee or the debtor can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee and to the debtor and, in any event, shall forthwith mail to such persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice, or on such shorter notice to that party as the court may prescribe, the trustee or the debtor may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(*f*) *Availability of other relief.*—Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 13–402. Duties of debtor.

In addition to performing other duties prescribed by these rules, the debtor shall (1) attend and submit to an examination at the first meeting of creditors and at such other times as ordered by the court; (2) attend at the hearing on confirmation of a plan and the hearing on a complaint objecting to his discharge, if any, and, if called as a witness, testify with respect to the issues raised; (3) if the court directs, file a statement of the executory contracts, including unexpired leases, to which he is a party; (4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and (5) comply with all orders of the court.

Rule 13–403. Exemptions.

A debtor shall claim his exemptions in the Chapter XIII Statement required to be filed by Rule 13–107.

Rule 13–404. Grant or denial of discharge.

(*a*) *Where debtor has completed performance.*—On completion by the debtor of all payments under the plan, the court shall forthwith grant the debtor his discharge unless he has filed a waiver under Rule 13–405.

(*b*) *Where debtor has not completed performance.*

(*1*) *Application and notice.*—A debtor who has not completed his payments under the plan may by application request a discharge under § 661 of the Act. On the filing of such application the court shall fix a time for the filing of a complaint objecting to the debtor's discharge and shall give at least 30 days' notice of the time so fixed to all creditors in the manner provided in Rule 13–203 and to the trustee. The court may for cause, on its own initiative or on application by any party in interest, extend the time for filing a complaint objecting to discharge.

(*2*) *Grant of discharge.*—On expiration of the time fixed for filing a complaint objecting to discharge, the court shall forthwith grant the discharge if no complaint objecting to discharge has been filed and if satisfied, after hearing on notice to the debtor, that the debtor's failure to complete payments was due to circumstances for which he could not justly be held accountable, unless the debtor has filed a waiver under Rule 13–405.

(*3*) *Applicability of Part VII of bankruptcy rules.*—A proceeding commenced by a complaint objecting to discharge is governed by Part VII of the Bankruptcy Rules.

(*c*) *Order of discharge.*—An order of discharge shall conform substantially to Official Form No. 13–16.

(*d*) *Registration in other districts.*—An order of discharge that has become final may be registered in any other district by filing in the office of the clerk of the district court of that district a certified copy of the order and when so registered shall have the same effect as an order of the court of the district where registered and may be enforced in like manner.

(*e*) *Notice of discharge.*—Within 45 days after an order of discharge becomes final, the court shall mail a copy of such order to the persons specified in subdivision (b)(1) of this rule.

Rule 13–405. Waiver of discharge.

Any debtor may waive his right to discharge by a writing filed with the court.

Rule 13–406. Notice of nondischarge.

If a waiver of discharge is filed, or if an order is entered denying or revoking a discharge, the court shall, within 30 days after the filing of the waiver or the entry of the order, give notice thereof by mail to all creditors in the manner provided in Rule 13–203.

Rule 13–407. Determination of dischargeability of a debt; judgment on nondischargeable debt; jury trial.

(*a*) *Proceeding to determine dischargeability.*

(*1*) *Persons entitled to file complaint; time for filing in ordinary case.*—A debtor or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt. Except as provided in paragraph (2) of this subdivision, the complaint may be filed at any time, and a case may be reopened without the payment of an additional filing fee for the purpose of filing a complaint under this rule.

(2) Time for filing complaint under § 17c (2) of the Act; notice of time fixed.—On or before the completion by a debtor of payments under a plan, or on application by a debtor for a discharge under § 661 of the Act, the court shall make an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c (2) of the Act and shall give at least 30 days' notice of the time so fixed to all creditors in the manner provided in Rule 13–203 and to the trustee. The court may for cause, on its own initiative or on application of any party in interest, extend the time fixed under this paragraph.

(b) Claim and demand for judgment on nondischargeable debt.—If his claim has not yet been reduced to judgment, the creditor shall include in a complaint or answer filed under subdivision (a) of this rule a statement of his claim and a demand for judgment on the debt as provided in § 17c (3) of the Act.

(c) Jury trial.—Either party may demand a trial by jury of any issue triable of right by a jury by serving on the other party and filing a demand therefor in writing at any time after the filing of a complaint under this rule and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed on a pleading of the party. In his demand the party shall specify the issues which he wishes to be so tried. If he has demanded trial by jury for only some of the issues so triable of right, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other issues so triable of right in the proceeding. The trial of an issue for which a jury trial has

been demanded shall be placed on the jury calendar of the district court when it is ready for trial unless (1) the bankruptcy judge determines after hearing on notice that the issue is not triable of right by a jury or (2) a local rule of court provides otherwise. Issues not triable of right by a jury may be tried by the bankruptcy judge, and motions and applications in the proceeding other than those necessarily incidental to and made during the course of the jury trial may be determined by the bankruptcy judge. The failure of a party to serve and file a demand in accordance with this rule constitutes a waiver by him of trial by jury. Rules 47–51 of the Federal Rules of Civil Procedure apply to a jury trial under this subdivision.

(*d*) *Applicability of Part VII of Bankruptcy Rules.*—A proceeding commenced by a complaint filed under this rule is governed by Part VII of the Bankruptcy Rules.

PART V. COURTS OF BANKRUPTCY; OFFICERS AND PERSONNEL; THEIR DUTIES

Rule 13–501. Administrative matters.

Part V of the Bankruptcy Rules applies in Chapter XIII cases.

PART VI. PROPERTY OF THE ESTATE

Rule 13–601. Burden of proof as to validity of post-petition transfer.

Any person asserting the validity of a transfer under § 70d of the Act shall have the burden of proof.

Rule 13–602. Accounting by prior custodian of property of the estate.

(*a*) *Accounting required.*—Any receiver or trustee appointed in proceedings not under the Act, assignee for the benefit of creditors, or agent, required by the Act to deliver property in his possession or control to the trustee, shall promptly file a written report and account with the bankruptcy court with respect to the property of the estate and his administration thereof.

(*b*) *Examination of administration.*—On the filing of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, the court shall determine the propriety of such administration, including the reasonableness of all disbursements.

Rule 13–603. Money of the estate: Deposit and disbursement.

(*a*) *Deposits; interest.*—The trustee shall deposit all money received by him in a designated depository, either in a checking account or, if authorized by the court, in an interest-bearing account or deposit, and, if authorized by the court, may deposit the funds of more than one estate in the same account or deposit.

(*b*) *Withdrawals and disbursements.*—The trustee shall withdraw and disburse money of the estate only by check or other method approved by the court.

Rule 13–604. Rejection of executory contracts.

When a motion is made for the rejection of an executory contract, including an unexpired lease, other than as part of the plan, the court shall set a hearing on notice to the parties to the contract and to such other persons as the court may designate.

Rule 13–605. Abandonment of property.

After hearing on such notice as the court may direct and on approval by the court the trustee may abandon any property.

Rule 13–606. Redemption of property from lien or sale.

On application by the trustee or debtor and after hearing on such notice as the court may direct, the court may authorize the redemption of property from a lien or from a sale to enforce a lien in accordance with applicable law.

Rule 13–607. Prosecution and defense of proceedings by trustee.

The trustee may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal.

Rule 13–608. Preservation of voidable transfer.

Whenever any transfer is voidable by the trustee, the court may determine, in an adversary proceeding in which are joined persons claiming interests or rights in the property subject to the transfer, whether the transfer shall be avoided only or shall be preserved for the benefit of the estate.

Rule 13–609. Proceeding to avoid indemnifying lien or transfer to surety.

If a lien voidable under § 67a of the Act has been dissolved by the furnishing of a bond or other obligation and the surety thereon has been indemnified by the transfer of, or the creation of a lien upon, nonexempt property of the debtor, the surety shall be joined as a defendant in any proceeding to avoid the indemnifying transfer or lien. Such proceeding is governed by Part VII of the Bankruptcy Rules. If an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, on motion by any party in interest, shall ascertain the value of such property or lien; if such value is less than the amount for which such property or lien is indemnity, the surety may elect to retain the property or lien on payment of the value so ascertained to the trustee or debtor, as the case may be, within such time as the court shall fix.

PART VII. ADVERSARY PROCEEDINGS

Rule 13–701. Adversary proceedings.

(*a*) *Adversary proceedings.*—Part VII of the Bankruptcy Rules governs any proceeding instituted by a party before a bankruptcy judge in a Chapter XIII case to (1) recover money or property other than a proceeding under Rule 13–210 or Rule 13–602, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 13–401, (7) object to confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of the bankrupt, (8) revoke the confirmation of a plan, or (9) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

(*b*) *Reference in Bankruptcy Rules.*—As applied in Chapter XIII cases, the reference in Bankruptcy Rule 741 to "a complaint objecting to the bankrupt's discharge" shall be read to include also a reference to "a complaint objecting to the confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt."

PART VIII. APPEAL TO DISTRICT COURT

Rule 13–801. Appeal to district court.

Part VIII of the Bankruptcy Rules applies in Chapter XIII cases except that Rule 802 (c) thereof shall read as follows:

> "(*c*). *Extension of time for appeal.*—The referee may extend the time for filing the notice of appeal

by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted on a showing of excusable neglect if the judgment or order is not a judgment or order under Rule 13–213 confirming a plan or is not a judgment or order under Rule 13–112 or Rule 13–215 dismissing a Chapter XIII case or converting a Chapter XIII case to bankruptcy."

PART IX. GENERAL PROVISIONS

Rule 13–901. General provisions.

Part IX of the Bankruptcy Rules applies in Chapter XIII cases except that:

(1) The references to various rules in Rule 906 (b) shall also include references to Rules 13–106 (b)(2) and 13–302 (e).

(2) The references to various rules in Rule 906 (c) shall also include references to Rules 13–203 (a), 13–302 (e), 13–404 (b)(1), and 13–407 (a)(2).

(3) The exception in Rule 910 (c) for "the execution and filing of a proof of claim" shall be read to include also "the execution and filing of an acceptance or a rejection of a plan" and the reference to Official Forms in that rule shall include also a reference to Official Form 13–8.

(4) The reference in Rule 913 (b) to "a dischargeable debt" shall be read as "a debt which is or will be provided for by the plan."

(5) The reference in Rule 919 (a) to "notice to the creditors as provided in Rule 203 (a) and to such other persons as the court may designate" shall be read as "such notice to such persons as the court may designate."

(6) The reference in Rule 922 (b) to Rule 102 shall be read as a reference to Rule 13–102.

(7) The reference in Rule 924 to the time allowed by § 15 of the Act for the filing of a complaint to revoke a discharge shall be read to include also a reference to the time allowed by § 671 of the Act for the filing of a complaint to revoke the confirmation of a plan.

OFFICIAL CHAPTER XIII FORMS

[NOTE. These official forms should be observed and used, with such alterations as may be appropriate to suit the circumstances. See Bankruptcy Rule 909, made applicable by Rule 13-901.]

FORM No. 13-1

ORIGINAL PETITION UNDER CHAPTER XIII

United States District Court
for the .... District of ....

In re

.... Bankruptcy No. ....

Debtor, Soc. Sec. No. ....
[*include here all names used*
by debtor within last 6 years]

ORIGINAL PETITION UNDER CHAPTER XIII

1. Petitioner's post-office address is ....
....

2. Petitioner has his principal place of employment [*or* his residence *or* his domicile] within this district.

3. No bankruptcy case initiated on a petition by or against petitioner is now pending.

4. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter XIII of the Bankruptcy Act.

5. Petitioner is insolvent [*or* unable to pay his debts as they mature].

6. A copy of petitioner's proposed plan is attached [*or* Petitioner intends to file a plan pursuant to Chapter XIII of the Act].

Wherefore petitioner prays for relief under Chapter XIII of the Act.

Signed: ....,
Attorney for Petitioner.

Address: ....,
....

[*Petitioner signs if not represented by attorney.*]

..................................,
Petitioner.

State of .... }
County of .... } ss.

I, ..., the petitioner named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

.....................................,
Petitioner.

Subscribed and sworn to before me on ....

.....................................,
....
[*Official character*]

[*Unless further time is granted by the court there must be filed with this petition or within 10 days thereafter both a Chapter XIII Statement (Official Form No. 13–5) pursuant to Rule 13–107 and a Chapter XIII Plan (Official Form No. 13–6) pursuant to Rule 13–201.*]

FORM No. 13–2

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

[*Caption, other than designation, as in Form No. 13–1*]

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

1. Applicant is filing herewith a petition under Chapter XIII of the Act.
2. He is unable to pay $........ [*or* all] of the filing fees except in installments.
3. He proposes that such fees be paid to the clerk of the district court upon the following terms:

....

....

4. He has paid no money and transferred no property to his attorney for services in connection with this case or with any pending bankruptcy case, and he will make no payment or transfer to his attorney for such services.

Wherefore applicant prays that he be permitted to pay $........ [*or* all] of the filing fees in installments.

Dated: ....
Signed: ....,
Applicant.

Address: ....,
....

FORM NO. 13-3

ORDER FOR PAYMENT OF FILING FEES IN INSTALLMENTS

[*Caption, other than designation, as in Form No. 13-1*]

ORDER FOR PAYMENT OF FILING FEES IN INSTALLMENTS

The application of the debtor for permission to pay the filing fees in this case in installments having been heard:

It is ordered that the debtor pay the filing fees still owing, namely, $........, as follows:

....

....

It is further ordered that all payments be made at the office of the clerk of the United States District Court located at ...., that the debtor shall pay no money and shall transfer no property to his attorney, that his attorney shall accept no money or property from the debtor for services in connection with this case or any pending bankruptcy case, and that any award of compensation to the attorney for services in connection with this case and any pending bankruptcy case shall be governed by Rule 13-309 and Bankruptcy Rule 219.

Dated: ....

....................................,
Bankruptcy Judge.

FORM No. 13-4

CHAPTER XIII PETITION IN PENDING BANKRUPTCY CASE

[*Caption, other than designation, as in Form No. 13-1*]

CHAPTER XIII PETITION IN PENDING BANKRUPTCY CASE

1. Petitioner's post-office address is ....
....

2. Petitioner is the bankrupt in Bankruptcy No. ...., pending in this court.

3. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter XIII of the Bankruptcy Act.

4. Petitioner is insolvent [*or* unable to pay his debts as they mature].

5. A copy of petitioner's proposed plan is attached [*or* Petitioner intends to file a plan pursuant to Chapter XIII of the Act].

Wherefore petitioner prays for relief under Chapter XIII of the Act.

Dated: ....

Signed: ....,
Attorney for Petitioner.

Address: ....,
....

[*Petitioner signs if not represented by attorney.*]

....,
Petitioner.

State of............................ }
County of......................... } *ss.*

I, ..., the petitioner named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

....,
Petitioner.

Subscribed and sworn to before me on ....
...................................,
....
[*Official character*]

[*Unless further time is granted by the court there must be filed with this petition or within 10 days thereafter both a Chapter XIII Statement (Official Form No. 13-5) pursuant to Rule 13-107 and a Chapter XIII Plan (Official Form No. 13-6) pursuant to Rule 13-201.*]

FORM NO. 13-5

CHAPTER XIII STATEMENT

[*Caption, other than designation, as in Form No. 13-1*]

CHAPTER XIII STATEMENT

[Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet, properly identified and made a part hereof, should be used and attached.

The term, "original petition," as used in the following questions, shall mean the original petition filed under Rule 13-103 or, if the petition is filed under Rule 13-104 in a pending bankruptcy case, shall mean the bankruptcy petition by or against you which originated the pending bankruptcy case.

This form must be completed in full whether a single or a joint petition is filed. When information is requested for "each" or "either spouse filing a petition" it should be supplied for both when a joint petition is filed.]

1. *Name and residence.*

a. Give full name.

Husband ....
Wife ....

b. Where does each spouse filing a petition now reside?

(1) Mailing address

Husband ....
Wife ....

(2) City or town

Husband ....
Wife ....

(3) Telephone number

Husband ....
Wife ....

c. What does each spouse filing a petition consider his or her residence, if different from that listed in b, above?

Husband ....
Wife ....

2. *Occupation and income.*

a. Give present occupation of each spouse filing a petition. (If more than one, list all for each spouse filing a petition.)

Husband ....
....
Wife ....
....

b. What is the name, address, and telephone number of present employer (or employers) of each spouse filing a petition? (Include also any identifying badge or card number with employer.)

Husband ....

....

Wife ....

....

c. How long has each spouse filing a petition been employed by present employer?

Husband ....

....

Wife ....

....

d. If either spouse filing a petition has not been employed by present employer for a period of 1 year, state the name of prior employer(s) and nature of employment during that period.

Husband ....

....

....

Wife ....

....

....

e. Has either spouse filing a petition operated a business, in partnership or otherwise, during the past 3 years? (If so, give the particulars, including names, dates, and places.)

Husband ....

....

Wife ....

....

f. Answer the following questions for each spouse whether single or joint petition is filed unless spouses are separated and a single petition is filed:

(1) Is your current pay period:

	Husband	*Wife*
(a) Weekly	....	....
(b) Semi-monthly	....	....
(c) Monthly	....	....
(d) Other (specify)..............	....	....

(2) What are your gross wages, salary or commissions per pay period?

Husband *Wife*

....

(3) What are your payroll deductions per pay period for:

	Husband	*Wife*
(a) Payroll taxes (including social security)	....	....
(b) Insurance	....	....
(c) Credit union....................	....	....
(d) Union dues....................	....	....
(e) Other (specify)................	....	....

(4) What is your take-home pay per pay period?

Husband *Wife*

....

(5) Is your employment subject to seasonal or other change?

Husband *Wife*

....

(6) What was the amount of your gross income for the last calendar year?

Husband *Wife*

....

(7) Has either of you made any wage assignments or allotments? (If so, indicate which spouse's wages assigned or allotted, the name and address of the person to whom assigned or allotted, and the amount owing, if any, to such person. If allotment or assignment is to a creditor, his claim should also be listed in Item 11a.)

....

....

....

3. *Dependents.* (To be answered for each spouse whether single or joint petition is filed unless spouses are separated and a single petition is filed.)

a. Does either of you pay [*or* receive] alimony, maintenance, or support? .... If so, how much per month? .... For whose support? (Give name, age, and relationship to you.)

Husband ....

....

....

Wife ....

....

....

b. List all other dependents, other than present spouse, not listed in a, above. (Give name, age, and relationship to you.)

Husband ....

....

....

Wife ....

....

....

4. *Budget.*

a. Give estimated average future monthly income for each spouse whether single or joint petition is filed unless spouses are separated and a single petition is filed.

(1) Husband's monthly take-home pay.......... ....
(2) Wife's monthly take-home pay............. ....
(3) Other monthly income (specify)............ ....

Total ....

b. Give estimated average future monthly expenses of family (not including debts to be paid under plan), consisting of:

(1) Rent or home mortgage payment (include lot rental for trailer)........................ ....
(2) Utilities (Electricity ...., Heat ...., Water ...., Telephone ....)....... ....
(3) Food ....
(4) Clothing ....
(5) Laundry and cleaning..................... ....
(6) Newspaper, periodicals, and books (including school books)............................ ....
(7) Medical and drug expenses................ ....
(8) Insurance (not deducted from wages)
    (a) Auto ....
    (b) Other ....
(9) Transportation (not including auto payments to be paid under plan).................... ....
(10) Recreation ....
(11) Club and union dues (not deducted from wages) ....
(12) Taxes (not deducted from wages)........... ....

(13) Alimony, maintenance, or support payments.. ....

(14) Other payments for support of dependents not living at home............................ ....

(15) Other (specify)

....

....

....

Total ....

c. Excess of estimated future monthly income (last line of Item 4a, above) over estimated future expenses (last line of Item 4b, above)........................ ....

d. Total amount to be paid each month under plan.. ....

5. *Payment of attorney.*

a. How much have you agreed to pay or what property have you agreed to transfer to your attorney in connection with this case?........................... ....

b. How much have you paid or what have you transferred to him?.................................... ....

6. *Tax refunds.* (To be answered for each spouse whether single or joint petition is filed unless spouses are separated and a single petition is filed.)

To what tax refunds (income or other), if any, is either of you, or may either of you be, entitled? (Give particulars, including information as to any refunds payable jointly to you or any other person. All such refunds should also be listed in Item 13b.)

....

....

7. *Bank accounts and safe deposit boxes.* (To be answered for each spouse whether single or joint petition is filed unless spouses are separated and a single petition is filed.)

a. Does either of you currently have any bank or savings and loan accounts, checking or savings? (If so, give name and address of bank, nature of account, current balance, and name and address of every other person authorized to make withdrawals from the account. Such accounts should also be listed in Item 13b.)

....

....

b. Does either of you currently keep any safe deposit boxes or other depositories? (If so, give name and address of bank or other depository, name and address of every other person who has a right of access thereto, and a brief description of the contents thereof, which should also be listed in Item 13b.)

....

....

8. *Prior bankruptcy.*

What proceedings under the Bankruptcy Act have previously been brought by or against either spouse filing a petition? (State the location of the bankruptcy court, the nature and number of each proceeding, the date when it was filed, and whether a discharge was granted or refused, the proceeding was dismissed, or a composition, arrangement, or plan was confirmed.)

....

....

9. *Foreclosures, executions, and attachments.* (To be answered for each spouse whether single or joint petition is filed unless spouses are separated and a single petition is filed.)

a. Is any of the property of either of you, including real estate, involved in a foreclosure proceeding, in or out of court? (If so, identify the property and the person foreclosing.)

....

....

b. Has any property or income of either of you been attached, garnished, or seized under any legal or equitable process within the 4 months immediately preceding the filing of the original petition herein? (If so, describe the property seized, or person garnished, and at whose suit.)

....

....

10. *Repossessions and returns.* (To be answered for each spouse whether single or joint petition is filed unless spouses are separated and a single petition is filed.)

Has any property of either of you been returned to, repossessed, or seized by the seller or by any other party, including a landlord, during the 4 months immediately preceding the filing of the original petition herein? (If so, give particulars, including the name and address of the party getting the property and its description and value.)

....

....

....

....

11. *Debts.* (To be answered for each spouse whether single or joint petition is filed.)

a. *Secured debts.* List all debts which are or may be secured by real or personal property. Indicate in sixth column, if debt payable in installments, the amount of each installment, the installment period (monthly, weekly, or other) and number of installments in arrears, if any. Indicate in last column whether husband or wife solely liable, or whether you are jointly liable.)

Creditor's name and address [if unknown, so state.]	Consideration or basis for debt	Amount claimed by creditor	If disputed, amount admitted by debtor	Description of collateral [include year and make of auto.]	Installment amount, period, and number of installments in arrears	Husband or wife solely liable, or jointly liable
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....

b. *Unsecured debts*. List all other debts, liquidated and unliquidated, including taxes, attorneys' fees and tort claims.

Creditor's name and address [if unknown, so state.]	Consideration or basis for debt	Amount claimed by creditor	If disputed, amount admitted by debtor	Husband or wife solely liable, or jointly liable
....	....	....	....	....
....	....	....	....	....
....	....	....	....	....
....	....	....	....	....
....	....	....	....	....
....	....	....	....	....
....	....	....	....	....

12. *Codebtors.* (To be answered for each spouse whether single or joint petition is filed.)

a. Are any other persons liable, as cosigners or in any other manner, on any of the debts of either of you or are either of you so liable on the debts of others? (If so, give particulars, indicating which spouse liable and including names of creditors, nature of debt, names and addresses of codebtors, and their relationship, if any to you.)

....

....

....

b. If so, have such codebtors made any payments on such debts? (Give name of each codebtor and amount paid by him.)

....

....

....

c. Have either of you made any payments on such debts? (If so, specify total amount paid to each creditor, whether paid by husband or wife, and name of codebtor.)

....

....

....

13. *Property.* (To be answered for each spouse whether single or joint petition is filed.)

a. *Real property.* List all real property owned by either of you at date of filing of original petition herein. (Indicate in last column whether owned solely by husband or wife, or jointly.)

Description and location of property	Name of any co-owner other than spouse	Present market value (without deduction for mortgage or other security interest)	Amount of mortgage or other security interest on this property	Name of mortgagee or other secured creditor	Value claimed exempt, if any	Owned solely by husband or wife, or jointly
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....

b. *Personal property.* List all other property owned by either of you at date of filing of original petition herein.

Description	Location of property if not at debtor's residence	Name of any co-owner other than spouse	Present market value (without deduction for mortgage or other security interest)	Amount of mortgage or other security interest on this property	Name of mortgagee or other secured creditor	Value claimed exempt, if any	Owned solely by husband or wife, or jointly
Autos [give year and make]							
....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....
Household goods							
....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....
Personal effects							
....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....
Other (specify)							
....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....

[To be signed and verified by both spouses when joint petition is filed.]

State of .... }
County of .... } *ss.*

I, ..., do hereby swear that I have read the answers contained in the foregoing statement, consisting of .... sheets, and that they are true and complete to the best of my knowledge, information, and belief.

....,
Husband.

Subscribed and sworn to before me on ....

....,
....
[*Official character*]

I, ..., do hereby swear that I have read the answers contained in the foregoing statement, consisting of .... sheets, and that they are true and complete to the best of my knowledge, information, and belief.

....,
Wife.

Subscribed and sworn to before me on ....

....,
....
[*Official character*]

Attorney for Debtor(s):

....,
Name

....
Address

FORM No. 13-6

CHAPTER XIII PLAN

[*Caption, other than designation, as in Form No. 13-1*]

CHAPTER XIII PLAN

1. The future earnings of the debtor are submitted to the supervision and control of the court and the debtor [*or* the debtor's

employer] shall pay to the trustee the sum of \$........ weekly [*or* semi-monthly *or* monthly].

2. From the payments so received, the trustee shall make disbursement as follows:

a. The priority payments required by Rule 13–309 (a).

b. After the above payments, dividends to secured creditors whose claims are duly proved and allowed as follows:

....

....

....

....

....

....

c. Subsequent to [*or* pro rata with] dividends to secured creditors, dividends to unsecured creditors whose claims are duly proved and allowed as follows:

....

....

....

....

3. [*If applicable*] The following executory contracts of the debtor are rejected:

....

....

....

4. Title to the debtor's property shall revest in the debtor on confirmation of a plan [*or* upon dismissal of the case after confirmation pursuant to Rule 13–215 or upon closing of the case pursuant to Bankruptcy Rule 514].

Dated: ....

....,
Debtor.

Acceptances may be mailed to

.....................................,
....
[*Post-office address*]

FORM No. 13-7

ORDER FOR FIRST MEETING OF CREDITORS AND RELATED ORDERS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

[*Caption, other than designation, as in Form No. 13-1*]

ORDER FOR FIRST MEETING OF CREDITORS AND RELATED ORDERS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the debtor, his creditors, and other parties in interest:
.... of *.........................., having filed a petition on .... stating that he desires to effect a plan under Chapter XIII of the Bankruptcy Act, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at ...., on ...., at .... o'clock ... m.

2. The debtor shall appear in person before the court at that time and place for the purpose of being examined.

3. The hearing on confirmation of the plan shall be held at the first meeting [*or* at ...., on................ at .... o'clock ... m. *or* at a date to be later fixed at the first meeting].

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

Creditors may file written objections to confirmation at any time prior to confirmation.

Creditors holding secured claims must, unless an extension of time is granted, file their claims on or before the date above set for the first meeting of creditors and all such creditors who fail to do so will not be treated as secured creditors for purposes of voting and distribution in the Chapter XIII case. At the meeting unsecured creditors may also file their claims, and all creditors may examine the debtor as permitted by the court, and transact such other business as may properly come before the meeting. In order to have his claim allowed for the purpose of voting and distribution, a creditor must file a claim, whether or not he is included in the list of creditors filed by the debtor. Where the Chapter XIII petition is filed in a pending bankruptcy case, claims filed in the bankruptcy case must be timely amended pursuant to Rule 13-302 (f). Claims which are not filed within 6 months after the date above set for the first meet-

---

**State post-office address.*

ing of creditors will not be allowed except as otherwise provided by law.

Any creditor filing a claim who has not filed a written acceptance or rejection of the plan pursuant to Rule 13–202 prior to the conclusion of the first meeting of creditors, in his proof of claim or otherwise, will be deemed to have accepted the plan.

The filing of the petition by the debtor above named operates as a stay of the commencement or continuation of any action against the debtor, of the enforcement of any judgment against him, of any act or the commencement or continuation of any court proceeding to enforce any lien on the property of the debtor, and of any court proceeding for the purpose of rehabilitation of the debtor or the liquidation of his estate, as provided by Rule 13–401.

A claim and an acceptance or rejection of the plan may be filed in the office of the undersigned bankruptcy judge on an official form prescribed in a proof of claim.

Dated: ....

......................................,
Bankruptcy Judge.

Form No. 13–8

Power of Attorney

[*Caption, other than designation, as in Form No. 13–1*]

Power of Attorney

To ...., of *...............,
and ...., of *....................:

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to receive dividends and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

Dated: ....

Signed: ....
[*If appropriate*] By ....
as ....
Address: ....,
....

[*If executed by an individual*] Acknowledged before me on ....

**State post-office address.*

[*If executed on behalf of a partnership*] Acknowledged before me on ...., by ...., who says that he is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on ...., by ...., who says that he is .... of the corporation named above and is authorized to execute this power of attorney on its behalf.

.....................................,

....

[*Official character*]

FORM NO. 13-9

PROOF OF CLAIM; ACCEPTANCE OR REJECTION OF PLAN

[*Caption, other than designation, as in Form No. 13-1*]

PROOF OF CLAIM; ACCEPTANCE OR REJECTION OF PLAN

1. [*If claimant is an individual claiming for himself*] The undersigned, who is the claimant herein, resides at *....................

[*If claimant is a partnersip claiming through a member*] The undersigned, who resides at *..................................., is a member of ...., a partnership composed of the undersigned and ...., of *..., and doing business at *.., and is authorized to make this proof of claim [*if appropriate,* and to accept or reject the plan] on behalf of the partnership.

[*If claimant is a corporation claiming through an authorized officer*] The undersigned, who resides at *......................, is the .... of ...., a corporation organized under the laws of .... and doing business at *....................................., and is authorized to make this proof of claim [*if appropriate,* and to accept or reject the plan] on behalf of the corporation.

[*If claim is made by agent*] The undersigned, who resides at *..., is the agent of ...., of *................. ...., and is authorized to make this proof of claim [*if appropriate,* and to accept or reject the plan] on behalf of the claimant.

**State post-office address.*

2. The debtor was, at the time of the filing of the petition initiating this case, and still is indebted [*or* liable] to this claimant in the sum of $........

3. The consideration for this debt [*or* ground of this liability] is as follows: ....

....

....

4. This claim consists of $........ in principal amount and $........ in additional charges [*or* no additional charges]. [*Itemize all charges in addition to principal amount of debt, state basis for inclusion and computation, and set forth any other consideration relevant to the legality of any charge.*] ....

....

....

....

....

5. [*If the claim is founded on a writing*] The writing on which this claim is founded (or a duplicate thereof) is attached hereto [*or* cannot be attached for the reason set forth in the statement attached hereto].

6. [*If appropriate*] This claim is founded on an open account, which became [*or* will become] due on ...., as shown by the itemized statement attached hereto. Unless it is attached hereto or its absence is explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it.

7. No judgment has been rendered on the claim except ....

....

....

8. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

9. This claim is not subject to any setoff or counterclaim except

....

....

10. No security interest is held for this claim except ....
.... [*If security interest in property of the debtor is claimed*] The undersigned claims the security interest under the writing referred to in paragraph 5 hereof [*or* under a separate writing which (or a duplicate of which) is attached hereto, *or* under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such security interest is also attached hereto.

[*Unless a security interest is properly claimed in this paragraph and proof of claim filed on or before the first date set for the first meeting of creditors or within such extended time as the court may allow, claimant will not be treated as a secured creditor for purposes of voting and distribution in the Chapter XIII case.*]

11. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 10 hereof is sufficient to satisfy the claim. [*If priority is claimed, state the amount and the basis thereof.*]

....

....

....

12. Claimant accepts [*or* rejects] the debtor's plan, dated .... [*Any creditor filing a claim who has not filed a written acceptance or rejection of the plan, in his proof of claim or otherwise, before the conclusion of the first meeting of creditors, will be deemed to have accepted the plan.*]

Dated: ....

Signed: ....

Penalty for Presenting Fraudulent Claim. Fine of not more than $5,000 or imprisonment for not more than 5 years or both—Title 18, U. S. C., § 152.

FORM No. 13-10

PROOF OF CLAIM BY DEBTOR OR TRUSTEE

[*Caption, other than designation, as in Form No. 13-1*]

PROOF OF CLAIM BY DEBTOR OR TRUSTEE

1. [*If person making claim is an individual*] The undersigned, who is filing this proof of claim, is the debtor [*or* the trustee] in this case and resides at *....................................

[*If person making claim is a corporation acting through an authorized officer*] The undersigned, who resides at *.. is the .... of ...., a corporation organized under the laws of .... and doing business at *......................, which corporation is the trustee in this case, and is authorized to make this proof of claim on behalf of the corporation.

[*If claim is made by agent*] The undersigned, who resides at *.., is the agent of ...., of *................................

**State post-office address.*

the debtor [*or* the trustee] in this case, and is authorized to make this proof of claim.

2. This claim is filed in the name of ...., of *.................................., who asserts a claim against the debtor in the sum of $........

3. The consideration for this debt [*or* ground for this liability] is as follows: ....

....

....

4. This claim consists of $......... in principal amount and $......... in additional charges [*or* no additional charges]. [*If appropriate*] The undersigned believes that $......... of the additional charges are illegal for the following reasons: ....

....

....

....

....

....

5. [*If the claim is founded on a writing*] The writing on which this claim is founded (or a duplicate thereof) is attached hereto [*or* cannot be attached for the reason set forth in the statement attached hereto].

6. [*If appropriate*] This claim is founded on an open account, which became [*or* will become] due on .... A note or other negotiable instrument was given for $........ of the account on .... [*or* no note or other negotiable instrument was given for the account or any part of it].

7. No judgment has been rendered on the claim except ....

....

8. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

9. This claim is not subject to any setoff or counterclaim except

....

....

10. No security interest is held for this claim except ....

....

[*If security interest in property of the debtor is held*] Claimant asserts the security interest under the writing referred to in paragraph 5 hereof [*or* under a separate writing which (or a duplicate of which) is attached hereto, *or* under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto].

**State post-office address.*

11. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 10 hereof is sufficient to satisfy the claim. [*If claim is or may be entitled to priority, state the amount and the basis thereof.*]

....
....
....

Dated: ....

Signed: ....

Penalty for Presenting Fraudulent Claim. Fine of not more than $5,000 or imprisonment for not more than 5 years or both—Title 18, U. S. C., § 152.

FORM No. 13–11

BOND OF TRUSTEE

[*Caption, other than designation, as in Form No. 13–1*]

BOND OF TRUSTEE

We, ... of *.............. ...., as principal, and .... of *............................... ...., as surety, bind ourselves to the United States in the sum of $........ for the faithful performance by the undersigned principal of his official duties as trustee of the estate of the above-named debtor.

Dated: ....

....,
....

FORM No. 13–12

ORDER APPROVING TRUSTEE'S BOND

[*Caption, other than designation, as in Form No. 13–1*]

ORDER APPROVING TRUSTEE'S BOND

The bond filed by .... of *.., as trustee of the estate of the above-named debtor is hereby approved.

Dated: ....

....,
Bankruptcy Judge.

**State post-office address.*

FORM No. 13-13

CERTIFICATE OF DESIGNATION AS TRUSTEE

[*Caption, other than designation, as in Form No. 13-1*]

CERTIFICATE OF DESIGNATION AS TRUSTEE

.... of *................. ...., standing trustee [*or* having previously filed a blanket bond approved by the court] has been designated as trustee of the estate of the above-named debtor.

Dated: ....

....,
Bankruptcy Judge.

FORM No. 13-14

ORDER FIXING TIME TO REJECT MODIFICATION OF PLAN PRIOR TO CONFIRMATION, COMBINED WITH NOTICE THEREOF

[*Caption, other than designation, as in Form No. 13-1*]

ORDER FIXING TIME TO REJECT MODIFICATION OF PLAN PRIOR TO CONFIRMATION, COMBINED WITH NOTICE THEREOF

To the debtor, his creditors, and other parties in interest:

The debtor having filed a modification of his plan on ...., it is ordered, and notice is hereby given, that:

1. .... is fixed as the last day for filing a written rejection of the modification.

2. A copy [*or* A summary] of the modification is attached hereto. Any creditor who has accepted, or who is deemed to have accepted, the plan and who fails to file a written rejection of the modification within the time above specified shall be deemed to have accepted the plan as modified.

Dated: ....

....,
Bankruptcy Judge.

**State post-office address.*

FORM No. 13-15

ORDER CONFIRMING PLAN

[*Caption, other than designation, as in Form No. 13-1*]

ORDER CONFIRMING PLAN

The debtor's plan filed on ...., [*if appropriate,* as modified by a modification filed on ....,] having been transmitted to his creditors; and

[*If appropriate*] The deposit required by the plan in the sum of $........ having been made; and

It having been determined after hearing on notice:

(1) That the plan has been accepted in writing, or is deemed to have been accepted, by the creditors whose acceptance is required by law [*or* by all creditors affected thereby]; and

(2) That the plan has been proposed and its acceptance procured in good faith and not by any means, promises, or acts forbidden by law [*and, if the plan is accepted by less than all affected creditors,* the provisions of Chapter XIII of the Act have been complied with, the plan is for the best interests of the creditors and is feasible, and the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt];

It is ordered that:

1. The debtor's plan [*if appropriate,* as modified] is confirmed.

2. On ...., and each .... thereafter until further order, the debtor shall pay [*or* ...., the employer of the debtor, shall deduct from the wages, salary, or commissions of the debtor and pay] to the trustee, ..., of *..., the sum of $........

Dated: ....

...................................,
Bankruptcy Judge.

**State post-office address.*

FORM No. 13-16

DISCHARGE OF DEBTOR

[*Caption, other than designation, as in Form No. 13-1*]

DISCHARGE OF DEBTOR

It appearing that the above-named debtor has filed a petition commencing a case under Chapter XIII of the Bankruptcy Act on ...., has had a plan confirmed, and has completed all payments under said plan [*or* has failed to complete payments under the plan due to circumstances for which he cannot justly be held accountable], it is ordered that:

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under § 17a and b and § 660 [*or* § 661] of the Act;

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

(c) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clause (8) of § 17a of the Act, except those debts on which an action was pending on the date when the petition was filed as specified above in which a right to jury trial existed and a party has either made a timely demand therefor or has submitted to this court a signed statement of intention to make such a demand;

(d) debts determined by this court to be discharged under § 17c (3) of the Act.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above-named debtor.

Dated: ....

....................................,

Bankruptcy Judge.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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APPEALS. See also **Courts; District of Columbia Code; Judgments; Procedure,** 1, 6–7.

1. *Filing fees—Reinstatement of appeal.*—Reinstatement, unopposed by Solicitor General, of *in forma pauperis* appeal that had been dismissed for failure to pay filing fee, directed in exercise of Court's supervisory powers. Gaca v. United States, p. 618.

2. *Timeliness—Entry of judgment—Certainty of date.*—Provision in Fed. Rule Civ. Proc. 58 that "[e]very judgment" of a district court "shall be set forth on a separate document" which, *inter alia,* starts the time limit for appeals and post-trial motions running, is a mechanical provision that must be mechanically applied to render certain the date on which a judgment is entered. United States v. Indrelunas, p. 216.

APPOINTED COUNSEL. See **Constitutional Law,** I, 2; **Probation; Procedure,** 8.

APPORTIONMENT. See **Voting Rights Act,** 1–4.

APPROVAL OF FEDERAL MARITIME COMMISSION. See **Antitrust Acts; Federal Maritime Commission.**

ARBITRARINESS. See **Administrative Procedure,** 1; **Judicial Review,** 1.

ARIZONA. See **Indians,** 1; **Taxes,** 1.

ARIZONA ENABLING ACT. See **Indians,** 1; **Taxes,** 1.

ARMED FORCES. See also **Constitutional Law,** I, 1.

Dependency allowances—Spouses of female members—Due Process.—District Court's ruling, upholding constitutionality of different treatment of dependency allowances for spouses of female members of Armed Forces as compared to spouses of male members, is reversed. Frontiero v. Richardson, p. 677.

ARMY CORPS OF ENGINEERS. See **Rivers and Harbors Act of 1899,** 1–2.

ARTICLE III COURTS. See **Courts; District of Columbia Code; Procedure,** 1.

ASKED PRICES. See **Taxes,** 2.

ASSESSABLE PROPERTY. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

ASSET ACQUISITIONS. See **Antitrust Acts; Federal Maritime Commission.**

ASSISTANCE OF COUNSEL. See **Pleas,** 2; **Procedure,** 3, 8.

ASSISTANCE TO FAMILIES OF WORKING POOR. See **Constitutional Law,** II, 1.

ATTORNEY GENERAL. See **Voting Rights Act,** 1–4.

ATTORNEYS. See **Constitutional Law,** I, 2; **Pleas,** 2; **Probation; Procedure,** 3, 8.

AUTHORIZATION TO ISSUE BONDS. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

"AUTOMATIC" STANDING. See **Constitutional Law,** V; **Evidence; Standing.**

BANK CHARTERS. See **Administrative Procedure,** 1; **Judicial Review,** 1.

BANK ROBBERY. See **Pleas,** 1; **Procedure,** 2.

BENEFITS. See **Armed Forces; Constitutional Law,** I, 1; II, 1.

BIAS. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

BID AND ASKED PRICES. See **Taxes,** 2.

BOARD OF OPTOMETRY. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

BOND ISSUES. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

BUCK ACT. See **Indians,** 1; **Taxes,** 1.

BURBANK. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

BURDEN OF PROOF. See **Civil Rights Act of 1964,** 2–3; **Voting Rights Act,** 1–4.

BUREAU OF NARCOTICS AND DANGEROUS DRUGS. See **Entrapment.**

CALIFORNIA. See **Civil Rights Act of 1871,** 1; **Elections; Jurisdiction,** 1–2.

CANCELLATION OF GOOD-TIME CREDITS. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

CANDIDATES. See **Elections.**

CEREMONIALLY MARRIED PARENTS. See **Constitutional Law,** II, 1.

CERTIORARI. See **Courts; District of Columbia Code; Procedure,** 1.

CHANGES IN DEPRECIATION METHODS. See **Administrative Procedure,** 4; **Taxes,** 4.

CHEMICAL POLLUTANTS. See **Rivers and Harbors Act of 1899,** 1–2.

CHILDREN. See **Constitutional Law,** II, 1.

CITIES. See **Administrative Procedure,** 2; **Federal Power Commission; Judicial Review,** 3.

"CITIZENS" FOR DIVERSITY PURPOSES. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

CITY ORDINANCES. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

CIVIL DISTURBANCES. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

CIVIL RIGHTS ACT OF 1871. See also **Abstention; Habeas Corpus,** 2; **Injunctions,** 2; **Jurisdiction,** 1–2; **Optometry; Procedure,** 5, 9.

1. *Federal cause of action—Liability of county—Civil liability for damages.*—Section 1988 of 42 U. S. C., as is clear from its legislative history, does not independently create a federal cause of action for violation of federal civil rights, and to apply that provision here by imposing vicarious liability on the County would contravene the holding in *Monroe* v. *Pape,* 365 U. S. 167, and Congress' intent to

CIVIL RIGHTS ACT OF 1871—Continued.

exclude a State's political subdivisions from civil liability under § 1983. Moor v. County of Alameda, p. 693.

2. *Injunctions—Alabama Board of Optometry—Bias.*—Anti-injunction statute did not bar District Court from issuing injunction since appellees brought their suit, to enjoin scheduled hearings by the Alabama Board of Optometry, under the Civil Rights Act. Nor did rule of *Younger* v. *Harris,* 401 U. S. 37, or principles of comity require the District Court to dismiss appellees' suit in view of pending Board proceeding since appellees alleged and the court concluded that the Board's bias rendered it incompetent to adjudicate the issues. Gibson v. Berryhill, p. 564.

3. *State prisoners—Habeas corpus.*—Although the broad language of 42 U. S. C. § 1983 seems literally to apply to suit by state prisoner seeking speedier release, Congress' enactment of specific federal habeas corpus statute, with its requirement that state prisoner exhaust state remedies, was intended to provide the exclusive means of relief in this type of situation. Preiser v. Rodriguez, p. 475.

CIVIL RIGHTS ACT OF 1964.

1. *Discrimination in employment—Equal Employment Opportunity Commission—Reasonable-cause finding.*—Complainant's right to bring suit under the Act is not confined to charges as to which the EEOC has made a reasonable-cause finding, and the District Court's error in holding to the contrary was not harmless since the issues raised with respect to § 703 (A)(1) were not identical to those with respect to § 704 (a) and the dismissal of the former charge may have prejudiced respondent's efforts at trial. McDonnell Douglas Corp. v. Green, p. 792.

2. *Racial employment discrimination—Burden of proof—Prima facie case.*—In a private, non-class-action complaint under Title VII charging racial employment discrimination, the complainant has the burden of establishing a prima facie case, which he can satisfy by showing that (i) he belongs to a racial minority; (ii) he applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications. McDonnell Douglas Corp. v. Green, p. 792.

3. *Racial employment discrimination—Prima facie case—Rebuttal.*—Although Court of Appeals correctly held that respondent proved a prima facie case, it erred in holding that petitioner had not discharged its burden of proof in rebuttal by showing that its

CIVIL RIGHTS ACT OF 1964—Continued.

stated reason for the rehiring refusal was based on respondent's illegal activity. But on remand respondent must be afforded fair opportunity of proving that petitioner's stated reason was just a pretext for a racially discriminatory decision. McDonnell Douglas Corp. v. Green, p. 792.

CLAIMS AGAINST COUNTY. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

CLASSIFICATIONS. See **Armed Forces; Constitutional Law,** I, 1; II, 3; **Judicial Review,** 2; **Schools,** 2.

CLEANUP COSTS. See **Federal-State Relations,** 1; **Pollution.**

COASTAL WATERS. See **Federal-State Relations,** 1; **Pollution.**

COCONSPIRATORS. See **Constitutional Law,** V; **Evidence; Standing.**

COERCION. See **Pleas,** 1; **Procedure,** 2.

COLLATERAL ATTACK. See **Pleas,** 1; **Procedure,** 2.

COLLATERAL REVIEW. See **Procedure,** 10; **Waivers.**

COMITY. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

COMMERCE CLAUSE. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

COMMISSION SALES. See **Administrative Procedure,** 6; **Judicial Review,** 4.

COMMON CARRIERS BY WATER. See **Antitrust Acts; Federal Maritime Commission.**

COMPENSATION OF JUDGES. See **Constitutional Law,** II, 2.

COMPETITION. See **Administrative Procedure,** 2–3; **Antitrust Acts; Federal Maritime Commission; Federal Power Commission; Judicial Review,** 3.

COMPTROLLER OF THE CURRENCY. See **Administrative Procedure,** 1; **Judicial Review,** 1.

CONCEALMENT OF FINANCE CHARGES. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

CONCLUSIVE PRESUMPTIONS. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

CONCLUSIVE SHOWING. See **Pleas,** 1; **Procedure,** 2.

CONDITIONAL-RELEASE PROGRAM. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

CONDITIONS OF EMPLOYMENT. See **Civil Rights Act of 1964,** 1–3.

CONGRESSIONAL CANDIDATES. See **Elections.**

CONSPIRACY TO TRANSPORT STOLEN GOODS. See **Constitutional Law,** V; **Evidence; Standing.**

CONSTITUTIONAL LAW. See also **Administrative Procedure,** 5; **Aid to Education; Armed Forces; Elections; Entrapment; Evidence; Fair Labor Standards Act; Federal-State Relations,** 2; **Judicial Review,** 2; **Penalties; Pleas,** 2; **Probation; Procedure,** 3, 8; **Schools,** 1–2; **Standing; Voting Rights Act,** 1–4; **Waivers.**

I. Due Process.

1. *Military dependency allowances—Spouses of female members of Armed Forces.*—District Court's ruling, upholding constitutionality of different treatment of dependency allowances for spouses of female members of Armed Forces as compared to spouses of male members, is reversed. Frontiero v. Richardson, p. 677.

2. *Probationer—Revocation hearings.*—Due process mandates preliminary and final revocation in the case of a probationer under the same conditions as are specified in *Morrissey* v. *Brewer,* 408 U. S. 471, in the case of a parolee. Gagnon v. Scarpelli, p. 778.

II. Equal Protection of the Laws.

1. *Family assistance programs—Illegitimate children.*—New Jersey statute limiting benefits of the "Assistance to Families of the Working Poor" program to those households in which the parents are ceremonially married and have at least one minor child of both, the natural child of one and adopted by other, or a child adopted by both, denies equal protection to illegitimate children. New Jersey Welfare Rights Org. v. Cahill, p. 619.

2. *Ohio constitutional provision—Compensation of municipal judges.*—Appellants' challenge to state constitutional provision, which District Court dismissed for inability to grant relief sought, is without merit. Ohio Municipal Judges Assn. v. Davis, p. 144.

3. *Texas school-financing system—Discrimination.*—The Texas school-financing system does not violate the Equal Protection Clause of the Fourteenth Amendment. Though concededly imperfect, the system bears a rational relationship to a legitimate state purpose. While assuring basic education for every child in the State, it permits and encourages participation in and significant control of each district's schools at the local level. San Antonio School District v. Rodriguez, p. 1.

CONSTITUTIONAL LAW—Continued.

III. Fifth Amendment.

Conclusive presumptions—Truth in Lending Act.—In imposing a disclosure requirement on all members of a defined class to discourage evasion by a substantial portion of that class, the challenged regulation does not create a conclusive presumption violative of the Fifth Amendment. Mourning v. Family Publications Service, Inc., p. 356.

IV. First Amendment.

Religion Clauses—Aid to schools—Retroactivity.—District Court's decree on remand following this Court's invalidation in *Lemon* v. *Kurtzman,* 403 U. S. 602, of Pennsylvania's statutory program to reimburse nonpublic sectarian schools for secular educational services, enjoining any payments for services rendered after that opinion but permitting Pennsylvania to reimburse the schools for services rendered prior thereto, is affirmed. Lemon v. Kurtzman, p. 192.

V. Fourth Amendment.

Defective warrant—Standing to contest admission of evidence.—Petitioners had no standing to contest admission of evidence seized under defective warrant since they alleged no legitimate expectation of privacy or interest of any kind in the premises searched or the goods seized; and they could not vicariously assert the personal Fourth Amendment right of the store owner in contesting admission of the seized goods. Brown v. United States, p. 223.

VI. Supremacy Clause.

Curfew on jet flights by city—Federal regulation.—In light of pervasive nature of scheme of federal regulation of aircraft noise, as reaffirmed and reinforced by the Noise Control Act of 1972, the Federal Aviation Administration, now in conjunction with the Environmental Protection Agency, has full control over aircraft noise, pre-empting state and local control. City of Burbank v. Lockheed Air Terminal, p. 624.

CONTRABAND. See **Entrapment.**

CORPORATE EMPLOYEES. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

CORPORATIONS. See **Securities Exchange Act of 1934.**

CORPS OF ENGINEERS. See **Rivers and Harbors Act of 1899,** 1–2.

COUNSEL. See **Constitutional Law,** I, 2; **Probation; Procedure,** 3, 8.

COUNSEL'S ADVICE. See **Pleas,** 2; **Procedure,** 3.

COUNTY'S LIABILITY FOR POLICE TORTS. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

COURTS. See also **Appeals,** 1–2; **District of Columbia Code; Procedure,** 1.

Article III courts—Acts of Congress.—Not every judicial proceeding that implicates a charge, claim, or defense based on an Act of Congress or a law made under its authority must be presided over by an Art. III judge. Palmore v. United States, p. 389.

COURTS OF APPEALS. See **Appeals,** 2; **Judgments; Procedure,** 6.

CREDIT TRANSACTIONS. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

CRIMINAL LAW. See **Appeals,** 1; **Civil Rights Act of 1871,** 3; **Constitutional Law,** I, 2; V; **Courts; District of Columbia Code; Entrapment; Evidence; Habeas Corpus,** 1–2; **Pleas,** 1–2; **Probation; Procedure,** 2–4, 7–10; **Rivers and Harbors Act of 1899,** 1–2; **Standing; Waivers.**

CURFEW ON JET FLIGHTS. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

CUSTODY. See **Habeas Corpus,** 1; **Procedure,** 4.

DATES. See **Appeals,** 2; **Judgments; Procedure,** 6.

DEADLINES. See **Elections.**

DECREES. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

DEFECTIVE WARRANTS. See **Constitutional Law,** V; **Evidence; Standing.**

DEFENSES. See **Entrapment.**

DEMONSTRATIONS. See **Civil Rights Act of 1964,** 1–3.

DENIAL OF COUNSEL. See **Constitutional Law,** I, 2; **Probation; Procedure,** 8.

DE NOVO HEARINGS. See **Administrative Procedure,** 1; **Judicial Review,** 1.

DEPENDENTS. See **Armed Forces; Constitutional Law,** I, 1.

DEPRECIATION METHODS. See **Administrative Procedure,** 4; **Taxes,** 4.

DISCHARGE OF EMPLOYEES. See **Civil Rights Act of 1964,** 1–3.

DISCHARGE OF POLLUTANTS. See **Rivers and Harbors Act of 1899,** 1–2.

DISCIPLINE. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

DISCLOSURES. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

DISCRETION. See **Abstention; Administrative Procedure,** 1, 6; **Aid to Education; Civil Rights Act of 1871,** 2; **Constitutional Law,** IV; **Elections; Injunctions; Judicial Review,** 1, 4; **Optometry; Procedure,** 5; **Schools,** 1; **Waivers.**

DISCRIMINATION. See **Armed Forces; Civil Rights Act of 1964,** 1–3; **Constitutional Law,** I, 1; II, 3; **Judicial Review,** 2; **Procedure,** 3, 10; **Schools,** 2; **Voting Rights Act,** 1–4; **Waivers.**

DISMISSAL OF APPEALS. See **Appeals,** 1; **Procedure,** 7.

DISQUALIFICATION. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

DISTRICT COURTS. See **Administrative Procedure,** 1; **Elections; Judicial Review,** 1; **Pleas,** 1; **Procedure,** 2.

DISTRICT OF COLUMBIA CODE. See also **Courts; Procedure,** 1.

Court system—Article III or Article I courts.—The strictly local court system created by the District of Columbia Court Reform and Criminal Procedure Act of 1970 pursuant to Congress' plenary Art. I power to legislate for the District of Columbia was intended to relieve the Art. III courts of the burdens of local civil and criminal litigation. Palmore v. United States, p. 389.

DISTRICT OF COLUMBIA COURT OF APPEALS. See **Courts; District of Columbia Code; Procedure,** 1.

DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970. See **Courts; District of Columbia Code; Procedure,** 1.

DIVERSITY JURISDICTION. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

DRUGS. See **Entrapment.**

DUE PROCESS. See **Administrative Procedure,** 5; **Armed Forces; Constitutional Law,** I, 1–2; **Entrapment; Penalties; Probation; Procedure,** 8.

DURESS. See **Constitutional Law,** I, 2; **Probation; Procedure,** 8.

EDUCATION. See **Aid to Education; Constitutional Law,** II, 3; IV; **Judicial Review,** 2; **Schools,** 1-2.

EDUCATIONAL SERVICES. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

ELECTIONS. See also **Voting Rights Act,** 1-4.

Inability to pay filing fee—Impending filing deadline—Injunction.—Given the possibility that appellee, who asserted inability to pay California's filing fee for candidacy for Congress, would prevail on the merits and the fact that his opportunity to be a candidate would have been foreclosed in face of impending filing deadline absent interim relief, District Court did not abuse its discretion in granting preliminary injunction. Brown v. Chote, p. 452.

ELECTRIC UTILITY COMPANIES. See **Administrative Procedure,** 2-3; **Federal Power Commission; Judicial Review,** 3.

ELEMENTARY SCHOOLS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

ELEVENTH AMENDMENT. See **Fair Labor Standards Act.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964,** 1-3; **Fair Labor Standards Act.**

ENTRAPMENT.

Narcotics agents—Supplying essential ingredient—Predisposition to commit offenses.—Entrapment defense did not bar conviction of respondent in view of evidence of his involvement in making the drug before and after agent's visits, and his concession "that he may have harbored a predisposition to commit the charged offenses." Nor was the agent's infiltration of the drug-making operation of such a nature as to violate the fundamental principles of due process. United States v. Russell, p. 423.

ENTRY OF JUDGMENT. See **Appeals,** 2; **Judgments; Procedure,** 6.

ENVIRONMENTAL PROTECTION AGENCY. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964,** 1-3.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** II, 1-3; **Elections; Judicial Review,** 2; **Pleas,** 2; **Procedure,** 3; **Schools,** 2; **Voting Rights Act,** 1-4; **Waivers.**

EQUITABLE DECREES. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

EQUITY. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

ERROR. See **Civil Rights Act of 1964,** 1; **Constitutional Law,** V; **Evidence; Standing.**

ESSENTIAL INGREDIENTS. See **Entrapment.**

ESTABLISHMENT OF RELIGION. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

ESTATE TAXES. See **Taxes,** 2.

EVIDENCE. See also **Administrative Procedure,** 1; **Constitutional Law,** V; **Judicial Review,** 1; **Rivers and Harbors Act of 1899,** 1–2; **Standing.**

Harmless error—Cumulative evidence—Statements of coconspirators.—Testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury, and the police testimony as to statements by petitioners implicating each other introduced into evidence in a manner contrary to *Bruton* v. *United States,* 391 U. S. 123, was harmless error. Brown v. United States, p. 223.

EVIDENTIARY HEARINGS. See **Pleas,** 1; **Procedure,** 2.

EXEMPTIONS FROM ANTITRUST LAWS. See **Antitrust Acts; Federal Maritime Commission.**

EXEMPTIONS FROM STATE TAXES. See **Indians,** 2; **Taxes,** 3.

EXHAUSTION OF REMEDIES. See **Abstention; Civil Rights Act of 1871,** 2; **Habeas Corpus,** 2; **Injunctions; Optometry; Procedure,** 5, 9.

EXPECTATIONS OF PRIVACY. See **Constitutional Law,** V; **Evidence; Standing.**

FAILURE TO PAY FILING FEES. See **Appeals,** 1; **Procedure,** 7.

FAIR LABOR STANDARDS ACT.

Suit by state employees—Immunity of State—Secretary of Labor.—Although 1966 amendments to the Act extended coverage to state employees, the legislative history discloses no congressional purpose to deprive a State of its constitutional immunity to suit in federal forum by employees of its nonprofit institutions. The amendments' extension of coverage to state employees is not without meaning as Secretary of Labor is thereby enabled to bring remedial action on their behalf under § 17 of the Act. Employees v. Missouri Public Health Dept., p. 279.

FAIR MARKET VALUE. See **Taxes,** 2.

FAIR WARNINGS. See **Rivers and Harbors Act of 1899,** 1–2.

FALSE WEIGHTS. See **Administrative Procedure,** 6; **Judicial Review,** 4.

FAMILY ASSISTANCE PROGRAMS. See **Constitutional Law,** II, 1.

FEDERAL AVIATION ADMINISTRATION. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

FEDERAL ESTATE TAXES. See **Taxes,** 2.

FEDERAL INSTRUMENTALITY. See **Indians,** 2; **Taxes,** 3.

FEDERALISM. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

FEDERAL JURISDICTION. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

FEDERAL MARITIME COMMISSION. See also **Antitrust Acts.**

Approval of agreements—Shipping Act, 1916—Exemption from antitrust laws.—In enacting § 15 of the Act, Congress conferred on the FMC the power to exempt from the antitrust laws agreements, or those portions of agreements, between carriers that create an ongoing arrangement in which both parties undertake continuing responsibilities, and which therefore necessitate continuous FMC supervision, but not one-time acquisition-of-assets agreements that result in one of the contracting parties ceasing to exist. FMC v. Seatrain Lines, Inc., p. 726.

FEDERAL POWER ACT. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

FEDERAL POWER COMMISSION. See also **Administrative Procedure,** 2–4; **Judicial Review,** 3; **Taxes,** 4.

Authorization to issue bonds—Anticompetitive effects—Electric utility companies.—The FPC, as a general rule, must consider the anticompetitive consequences of a security issue under § 204 of the Federal Power Act, as the Act did not render antitrust policy irrelevant to the FPC's regulation of the electric power industry. Gulf States Utilities Co. v. FPC, p. 747.

FEDERAL RESERVE BOARD. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

FEDERAL RULES OF APPELLATE PROCEDURE. See **Appeals,** 2; **Judgments; Procedure,** 6.

FEDERAL RULES OF CIVIL PROCEDURE. See **Appeals,** 2; **Judgments; Procedure,** 6.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Pleas,** 1; **Procedure,** 2, 10; **Waivers.**

FEDERAL-STATE RELATIONS. See also **Civil Rights Act of 1871,** 3; **Constitutional Law,** VI; **Habeas Corpus,** 2; **Indians,** 1–2; **Pollution; Procedure,** 9; **Taxes,** 1–3.

1. *Florida Oil-Spill Prevention and Pollution Control Act—No pre-emption by Federal Water Quality Improvement Act.*—Florida's Act, providing for State's recovery of cleanup costs and imposing strict, no-fault liability on waterfront oil-handling facilities and ships destined for or leaving such facilities for any oil-spill damage, does not, in context of action by shipping interests to enjoin application of Florida statute, invade regulatory area pre-empted by Federal Water Quality Improvement Act. Nor is State's police power over sea-to-shore pollution pre-empted by Admiralty Extension Act. Askew v. American Waterways Operators, Inc., p. 325.

2. *Regulation of aircraft noise—City ordinance—Federal Aviation Administration.*—In light of pervasive nature of scheme of federal regulation of aircraft noise, as reaffirmed and reinforced by the Noise Control Act of 1972, the FAA, now in conjunction with the Environmental Protection Agency, has full control over aircraft noise, pre-empting state and local control. City of Burbank v. Lockheed Air Terminal, p. 624.

FEES. See **Appeals,** 1; **Elections; Procedure,** 7.

FIFTH AMENDMENT. See **Administrative Procedure,** 5; **Armed Forces; Constitutional Law,** III; **Entrapment; Penalties.**

FILING FEES. See **Appeals,** 1; **Elections; Procedure,** 7.

FINAL JUDGMENTS. See **Appeals,** 2; **Judgments; Procedure,** 6.

FINANCE CHARGES. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

FINANCIAL ASSISTANCE. See **Constitutional Law,** II, 1.

FINANCING EDUCATION. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

FIRST AMENDMENT. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

FISCAL PLANNING. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

FLORIDA OIL-SPILL PREVENTION AND POLLUTION CONTROL ACT. See **Federal-State Relations,** 1; **Pollution.**

"FLOW THROUGH." See **Administrative Procedure,** 4; **Taxes,** 4.

"FOUR INSTALLMENT RULE." See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** I, 2; II, 1–3; **Elections; Judicial Review,** 2; **Pleas,** 2; **Probation; Procedure,** 3; **Schools,** 2; **Voting Rights Act,** 1–4.

FOURTH AMENDMENT. See **Constitutional Law,** V; **Evidence; Standing.**

FUNDAMENTAL RIGHTS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

GEORGIA. See **Voting Rights Act,** 1–4.

GOOD-BEHAVIOR-TIME CREDITS. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

GOOD-FAITH RELIANCE. See **Aid to Education; Constitutional Law,** IV; **Rivers and Harbors Act of 1899,** 1–2; **Schools,** 1.

GOVERNMENT AGENTS. See **Entrapment.**

GOVERNMENT SUPPLYING CONTRABAND. See **Entrapment.**

GRAND JURIES. See **Pleas,** 2; **Procedure,** 3, 10; **Waivers.**

GROSS RECEIPTS TAX. See **Indians,** 2; **Taxes,** 3.

GUILTY PLEAS. See **Pleas,** 1–2; **Procedure,** 2–3.

HABEAS CORPUS. See also **Civil Rights Act of 1871,** 3; **Pleas,** 2; **Procedure,** 3–4, 9–10; **Waivers.**

1. *Release on recognizance—In custody.*—Restraints imposed on petitioner who was released on his own recognizance constitute "custody" within meaning of federal habeas corpus statute. Hensley v. Municipal Court, p. 345.

2. *State prisoners—Speedier release—Civil Rights actions.*—When state prisoner challenges the fact or duration of his physical imprisonment and by way of relief seeks a determination that he is entitled to immediate release or speedier release, his sole remedy is a writ of habeas corpus. Preiser v. Rodriguez, p. 475.

HARMLESS ERROR. See **Civil Rights Act of 1964,** 1; **Constitutional Law,** V; **Evidence; Standing.**

HEARINGS. See **Administrative Procedure,** 1–3; **Constitutional Law,** I, 2; **Federal Power Commission; Judicial Review,** 1; **Pleas,** 1; **Probation; Procedure,** 2, 8.

HIRING PRACTICES. See **Civil Rights Act of 1964,** 1–3.

HOLLYWOOD-BURBANK AIRPORT. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

HOUSEHOLDS. See **Constitutional Law,** II, 1.

HUSBANDS OF WOMEN IN ARMED FORCES. See **Armed Forces; Constitutional Law,** I, 1.

ILLEGAL CONDUCT. See **Civil Rights Act of 1964, 1–3.**

ILLEGAL SEARCHES. See **Constitutional Law,** V; **Evidence; Standing.**

ILLEGAL WIRETAPPING. See **Appeals,** 1; **Procedure,** 7.

ILLEGITIMATE CHILDREN. See **Constitutional Law,** II, 1.

IMMUNITY OF STATE. See **Fair Labor Standards Act.**

IMPRISONMENT. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

INABILITY TO PAY FILING FEES. See **Appeals,** 1; **Procedure,** 7.

INCOME TAXES. See **Indians,** 1; **Taxes,** 1.

INCOME TAX EXPENSES. See **Administrative Procedure,** 4; **Taxes,** 4.

INDETERMINATE SENTENCES. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

INDIAN REORGANIZATION ACT. See **Indians,** 2; **Taxes,** 3.

INDIANS. See also **Taxes,** 1, 3.

1. *Arizona income tax—Navajo Indians—Income from reservation sources.*—Arizona has no jurisdiction to impose tax on income of Navajo Indians residing on the Navajo Reservation and whose income is wholly derived from reservation sources, as is clear from the relevant treaty with the Navajos and federal statutes. **McClanahan v. Arizona State Tax Comm'n, p. 164.**

2. *Operation of ski resort—State gross receipts and use taxes—Exemptions.*—New Mexico may impose gross receipts tax on ski resort operated by petitioner Tribe on off-reservation land leased from Federal Government under § 5 of the Indian Reorganization Act, 25 U. S. C. § 465. Though § 465 exempts the land from state and local taxation, neither it nor the federal-instrumentality doctrine bars taxing income from the land. But § 465 bars use tax that State seeks to impose on personalty bought by Tribe out of State and which, having been installed as a permanent improvement at the resort, became so intimately connected with the land as to be covered by the statutory exemption. Mescalero Apache Tribe v. Jones, p. 145.

INDIGENT PROBATIONERS. See **Constitutional Law,** I, 2; **Probation; Procedure,** 8.

INDUSTRIAL POLLUTANTS. See **Rivers and Harbors Act of 1899,** 1–2.

IN FORMA PAUPERIS APPEALS. See **Appeals,** 1; **Procedure,** 7.

INJUNCTIONS. See also **Abstention; Civil Rights Act of 1871,** 2; **Elections; Optometry; Procedure,** 5; **Voting Rights Act,** 1–4.

Anti-injunction statute—Civil Rights Act—Alabama Board of Optometry.—Anti-injunction statute did not bar District Court from issuing injunction since appellees brought their suit, to enjoin scheduled hearings by the Alabama Board of Optometry, under the Civil Rights Act. Nor did the rule of *Younger* v. *Harris,* 401 U. S. 37, or principles of comity require the District Court to dismiss appellees' suit in view of pending Board proceeding since appellees alleged and the court concluded that the Board's bias rendered it incompetent to adjudicate the issues. Gibson v. Berryhill, p. 564.

IN-PRISON DISCIPLINE. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

INSIDER'S PROFITS. See **Securities Exchange Act of 1934.**

INSTALLMENT SALES. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

INTENTIONAL AND FLAGRANT CONDUCT. See **Administrative Procedure,** 6; **Judicial Review,** 4.

INTERIM RELIEF. See **Elections.**

INTERNAL REVENUE CODE. See **Administrative Procedure,** 4; **Taxes,** 2, 4.

INTERSTATE COMMERCE. See **Constitutional Law,** V; **Evidence; Standing.**

INTERVENTION BY CITIES. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

INVALIDATION OF STATUTORY PROGRAM. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

INVESTIGATIONS. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

INVESTIGATORS. See **Entrapment.**

INVESTMENT COMPANY ACT OF 1940. See **Taxes,** 2.

INVESTMENTS. See **Securities Exchange Act of 1934.**

ISSUANCE OF SECURITIES. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

JET AIRCRAFT. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

JUDGES. See **Constitutional Law,** II, 2; **Courts; District of Columbia Code; Procedure,** 1.

JUDGMENTS. See also **Appeals,** 2; **Procedure,** 6.

Certainty of date—Timeliness of appeals.—Provision in Fed. Rule Civ. Proc. 58 that "[e]very judgment" of a district court "shall be set forth on a separate document" which, *inter alia,* starts the time limit for appeals and post-trial motions running, is a mechanical provision that must be mechanically applied to render certain the date on which a judgment is entered. United States v. Indrelunas, p. 216.

JUDICIAL REVIEW. See also **Administrative Procedure,** 2–3; **Appeals,** 1; **Constitutional Law,** II, 3; **Federal Power Commission; Procedure,** 7; **Schools,** 2.

1. *Comptroller of the Currency—Denial of national bank charter—Standard of review by district courts.*—Standard of judicial review of Comptroller of Currency's denial of national bank charter is whether his adjudication was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." District Court is to review the administrative record already in existence, supplemented if necessary by affidavits or testimony amplifying reasons for Comptroller's decision, and is not authorized to conduct a *de novo* hearing in which the "substantial evidence" test is to be applied. Camp v. Pitts, p. 138.

2. *Strict judicial scrutiny—Discrimination—Fundamental constitutional rights.*—This case, concerning the Texas school-financing system, is not a proper one in which to examine a State's laws under standards of strict judicial scrutiny, since that test is reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly protected by the Constitution. San Antonio School District v. Rodriguez, p. 1.

3. *Summary administrative action—Federal Power Commission—Hearings.*—Though the FPC is not necessarily required to hold a hearing or make a full investigation in all cases, its summary disposition of proffered objections to the security issue requires strict scrutiny by a reviewing court in light of the FPC's obligation to protect the public interest and enforce the antitrust laws. Unexplained summary action is incompatible with the requirements of § 204 of

JUDICIAL REVIEW—Continued.

the Federal Power Act and precludes appropriate judicial review. Gulf States Utilities Co. v. FPC, p. 747.

4. *Suspension of stockyard operator—Packers and Stockyards Act—Court of Appeals.*—In setting aside 20-day suspension order against stockyard operator for short-weighting, Court of Appeals exceeded scope of proper judicial review of administrative sanctions, since Secretary of Agriculture had full authority to make the suspension order as a deterrent to violations whether intentional or negligent, and issuance of order against respondent, who had ignored previous warnings against short-weighting, was not an abuse of administrative discretion. Butz v. Glover Livestock Comm'n Co., p. 182.

JURISDICTION. See also **Antitrust Acts**; **Appeals**, 2; **Civil Rights Act of 1871**, 1; **Courts**; **District of Columbia Code**; **Federal Maritime Commission**; **Indians**, 1; **Judgments**; **Procedure**, 6; **Taxes**, 1.

1. *Diversity of citizenship—State law claims—Political subdivisions.*—District Court erred in rejecting petitioner's state law claim against the County, which under California law has an independent status, on the basis of diversity of citizenship, since diversity jurisdiction extends to a State's political subdivision that is not simply the arm or *alter ego* of the State, *Cowles* v. *Mercer County*, 7 Wall. 118. Moor v. County of Alameda, p. 693.

2. *Pendent jurisdiction—Claims against a county—Civil Rights Act suit.*—Even assuming, *arguendo*, that the District Court had judicial power to exercise pendent jurisdiction over petitioners' state law claims which would require that the County be brought in as new party defendant, against which petitioners could not state a federally cognizable claim, in addition to the individual defendants against whom they could assert such a claim, the court did not abuse its discretion in not exercising that power in view of unsettled questions of state law that it would have been called upon to resolve and the likelihood of jury confusion resulting from the special defenses to a county available under the state tort claims law. Moor v. County of Alameda, p. 693.

JURY SELECTION. See **Pleas**, 2; **Procedure**, 3, 10; **Waivers.**

LABOR. See **Fair Labor Standards Act.**

LAW ENFORCEMENT OFFICERS. See **Civil Rights Act of 1871**, 1; **Jurisdiction**, 1–2.

LAWYERS. See **Constitutional Law**, I, 2; **Pleas**, 2; **Probation**; **Procedure**, 3, 8.

LEASED LANDS. See **Indians,** 2; **Taxes,** 3.

LEGISLATIVE REAPPORTIONMENT. See **Voting Rights Act,** 1–4.

LEGITIMATE STATE PURPOSES. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

LICENSED OPTOMETRISTS. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

LIVESTOCK DEALERS. See **Administrative Procedure,** 6; **Judicial Review,** 4.

LOAD FUNDS. See **Taxes,** 2.

LOCAL CONTROL OF SCHOOLS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

LOCAL TAXATION. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

"LOCK-IN" DEMONSTRATIONS. See **Civil Rights Act of 1964,** 1–3.

MAGAZINE SUBSCRIPTIONS. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

MAJORITY RUNOFF ELECTIONS. See **Voting Rights Act,** 1–4.

MANUFACTURING DRUGS. See **Entrapment.**

MARITIME DAMAGE. See **Federal-State Relations,** 1; **Pollution.**

MARKET AGENCIES. See **Administrative Procedure,** 6; **Judicial Review,** 4.

MARKET VALUE. See **Taxes,** 2.

MARRIED PARENTS. See **Constitutional Law,** II, 1.

MARRIED WOMEN. See **Armed Forces; Constitutional Law,** I, 1.

MEDICAL AND DENTAL BENEFITS. See **Armed Forces; Constitutional Law,** I, 1.

MERCHANT SHIPPING. See **Antitrust Acts; Federal Maritime Commission.**

MERCHANT SHIPS. See **Federal-State Relations,** 1; **Pollution.**

MERGERS. See **Antitrust Acts; Federal Maritime Commission; Securities Exchange Act of 1934.**

MESCALERO APACHE TRIBE. See **Indians,** 2; **Taxes,** 3.

METHAMPHETAMINES. See **Entrapment.**

METHOD OF JURY SELECTION. See **Pleas,** 2; **Procedure,** 3, 10; **Waivers.**

METHODS OF DEPRECIATION. See **Administrative Procedure,** 4; **Taxes,** 4.

MEXICAN-AMERICANS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

MILITARY DEPENDENTS. See **Armed Forces; Constitutional Law,** I, 1.

MINORITY EMPLOYEES. See **Civil Rights Act of 1964,** 1–3.

MINORITY GROUPS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

MINORITY STOCKHOLDERS. See **Securities Exchange Act of 1934.**

MISSOURI. See **Fair Labor Standards Act.**

MOOTNESS. See **Voting Rights Act,** 1–4.

MOTIONS. See **Appeals,** 2; **Judgments; Procedure,** 6.

MOTIONS TO SUPPRESS. See **Constitutional Law,** V; **Evidence; Standing.**

MULTIMEMBER DISTRICTS. See **Voting Rights Act,** 1–4.

MUNICIPAL JUDGES. See **Constitutional Law,** II, 2.

MUNICIPAL LIABILITY UNDER STATE LAW. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

MUTUAL FUNDS. See **Taxes,** 2.

NARCOTICS AGENTS. See **Entrapment.**

NATIONAL BANKING ACT. See **Administrative Procedure,** 1; **Judicial Review,** 1.

NATIONAL BANKS. See **Administrative Procedure,** 1; **Judicial Review,** 1.

NATURAL CHILDREN. See **Constitutional Law,** II, 1.

NATURAL GAS ACT. See **Administrative Procedure,** 4; **Taxes,** 4.

NAVAJO RESERVATION. See **Indians,** 1; **Taxes,** 1.

NAVIGABLE WATERS. See **Rivers and Harbors Act of 1899,** 1–2.

NAVIGATION OBSTRUCTIONS. See **Rivers and Harbors Act of 1899,** 1–2.

NEGROES. See **Civil Rights Act of 1964,** 1–3; **Pleas,** 2; **Procedure,** 3; **Voting Rights Act,** 1–4; **Waivers.**

NET ASSET VALUE. See **Taxes,** 2.

NEW JERSEY. See **Constitutional Law,** II, 1.

NEW MEXICO. See **Indians,** 2; **Taxes,** 3.

NEW YORK. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

NO-FAULT LIABILITY. See **Federal-State Relations,** 1; **Pollution.**

NOISE CONTROL ACT OF 1972. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

NONPUBLIC SCHOOLS. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

NORMALIZATION. See **Administrative Procedure,** 4; **Taxes,** 4.

NUMBERED POSTS. See **Voting Rights Act,** 1–4.

OBJECTIONS BY ATTORNEY GENERAL. See **Voting Rights Act,** 1–4.

OBSTRUCTING NAVIGATION. See **Rivers and Harbors Act of 1899,** 1–2.

OHIO CONSTITUTION. See **Constitutional Law,** II, 2.

OIL SPILLS. See **Federal-State Relations,** 1; **Pollution.**

OPEN-END INVESTMENT COMPANIES. See **Taxes,** 2.

OPTICAL COMPANY EMPLOYEES. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

OPTIONS TO SELL. See **Securities Exchange Act of 1934.**

OPTOMETRY. See also **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Procedure,** 5.

Alabama Board of Optometry—Private practitioners—Bias.—Since the Board was composed solely of private practitioners, and the corporate employees it sought to bar from practice constituted half the optometrists in the State, the District Court was warranted in concluding that the Board members' pecuniary interest disqualified them from passing on the issues. Gibson v. Berryhill, p. 564.

ORDINANCES. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

OVERTIME PAY. See **Fair Labor Standards Act.**

PACKERS AND STOCKYARDS ACT. See **Administrative Procedure,** 6; **Judicial Review,** 4.

PARENTS. See **Constitutional Law,** II, 1.

PAROLE. See **Civil Rights Act of 1871,** 3; **Constitutional Law,** I, 2; **Habeas Corpus,** 2; **Probation; Procedure,** 8–9.

PAUPERS. See **Appeals,** 1; **Procedure,** 7.

PECUNIARY INTERESTS. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

PENALTIES. See also **Administrative Procedure,** 5–6; **Constitutional Law,** III; **Judicial Review,** 4.

Truth in Lending Act—Nondisclosure of finance charges.—Imposition, pursuant to § 130 of the Act, of a minimum penalty of $100 in cases such as this where the finance charge is nonexistent or undetermined, but where disclosure has not been made, is a permissible sanction. Mourning v. Family Publications Service, Inc., p. 356.

PENDENT JURISDICTION. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

PERMANENT IMPROVEMENTS. See **Indians,** 2; **Taxes,** 3.

PERMITS. See **Rivers and Harbors Act of 1899,** 1–2.

PER-PUPIL EXPENDITURES. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

PERSONALTY. See **Indians,** 2; **Taxes,** 3.

"PERSONS" SUABLE. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

PILFERAGE. See **Constitutional Law,** V; **Evidence; Standing.**

PLEAS. See also **Procedure,** 2–3.

1. *Collateral attack—Evidentiary hearing—Not "conclusively show[n]" that petitioner was entitled to no relief.*—Petitioner, who made uncounseled guilty plea in open court and was sentenced to prison, may collaterally attack plea and is entitled to evidentiary hearing under 28 U. S. C. § 2255 since his motion under that provision set out detailed factual allegations, in part documented by records, supporting his claim that plea was coerced, and since it cannot be said that the record before the District Court "conclusively show[ed]" that petitioner was entitled to no relief. Fontaine v. United States, p. 213.

2. *Guilty pleas on advice of counsel—Federal habeas corpus—Grand jury discrimination.*—Where state criminal defendant, on advice of counsel, pleads guilty, he cannot in federal habeas corpus proceeding raise independent claims relating to deprivation of constitutional rights that antedated the plea, such as infirmities in grand

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jury selection process, but may only attack voluntary and intelligent character of the guilty plea by showing that counsel's advice was not within standards of *McMann v. Richardson*, 397 U. S. 759. Tollett v. Henderson, p. 258.

POLICE POWER OF STATES. See **Federal-State Relations**, 1; **Pollution.**

POLITICAL SUBDIVISIONS. See **Civil Rights Act of 1871**, 1; **Jurisdiction**, 1–2.

POLLUTION. See also **Federal-State Relations**, 1; **Rivers and Harbors Act of 1899**, 1–2.

Florida Oil-Spill Prevention and Pollution Control Act—Federal-state relations—No pre-emption by Federal Water Quality Improvement Act.—Florida's Act, providing for State's recovery of cleanup costs and imposing strict, no-fault liability on waterfront oil-handling facilities and ships destined for or leaving such facilities for any oil-spill damage, does not, in context of action by shipping interests to enjoin application of Florida statute, invade regulatory area pre-empted by Federal Water Quality Improvement Act. Nor is State's police power over sea-to-shore pollution pre-empted by Admiralty Extension Act. Askew v. American Waterways Operators, Inc., p. 325.

POOR PERSONS. See **Appeals**, 1; **Constitutional Law**, II, 3; **Judicial Review**, 2; **Procedure**, 7; **Schools**, 2.

POSSESSORY INTERESTS. See **Constitutional Law**, V; **Evidence**; **Standing.**

POST-CONVICTION RELIEF. See **Pleas**, 2; **Procedure**, 3, 10; **Waivers.**

POST-TRIAL MOTIONS. See **Appeals**, 2; **Judgments**; **Procedure**, 6.

PRACTICE OF OPTOMETRY. See **Abstention**; **Civil Rights Act of 1871**, 2; **Injunctions**; **Optometry**; **Procedure**, 5.

PREDISPOSITION TO COMMIT OFFENSES. See **Entrapment.**

PRE-EMPTION. See **Constitutional Law**, VI; **Federal-State Relations**, 1–2; **Pollution.**

PRELIMINARY INJUNCTIONS. See **Elections.**

PRESUMPTIONS. See **Administrative Procedure**, 5; **Constitutional Law**, III; **Penalties.**

PRICES. See **Taxes**, 2.

PRIMA FACIE CASE. See **Civil Rights Act of 1964,** 2–3.

PRISON DISCIPLINE. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

PRIVACY. See **Constitutional Law,** V; **Evidence; Standing.**

PROBATION. See also **Constitutional Law,** I, 2; **Procedure,** 8.

Revocation of probation—Hearings—Appointment of counsel.—Body conducting revocation of probation hearings should decide in each individual case whether due process requires that an indigent probationer be represented by counsel. In every case where a request for counsel is refused, the grounds for refusal should be stated succinctly in the record. Gagnon v. Scarpelli, p. 778.

PROCEDURE. See also **Abstention; Administrative Procedure,** 1–3, 6; **Appeals,** 1–2; **Civil Rights Act of 1871,** 2–3; **Civil Rights Act of 1964,** 1–3; **Constitutional Law,** I, 2; **Courts; District of Columbia Code; Entrapment; Evidence; Habeas Corpus,** 1–2; **Injunctions; Judgments; Judicial Review,** 1, 3–4; **Optometry; Pleas,** 1–2; **Probation; Rivers and Harbors Act of 1899,** 1–2; **Standing; Voting Rights Act,** 1–4; **Waivers.**

1. *Appeals—District of Columbia Code not state statute—Certiorari.*—The District of Columbia Code is not a state statute for purposes of 28 U. S. C. § 1257 (2), and the lower court's upholding of the federal statute is therefore not reviewable by appeal but by certiorari. Palmore v. United States, p. 389.

2. *Guilty plea—Collateral attack—Evidentiary hearing.*—Petitioner, who made uncounseled guilty plea in open court and was sentenced to prison, may collaterally attack plea and is entitled to evidentiary hearing under 28 U. S. C. § 2255 since his motion under that provision set out detailed factual allegations, in part documented by records, supporting his claim that plea was coerced, and since it cannot be said that the record before the District Court "conclusively show[ed]" that petitioner was entitled to no relief. Fontaine v. United States, p. 213.

3. *Habeas corpus—Grand jury discrimination—Guilty pleas.*—Where state criminal defendant, on advice of counsel, pleads guilty, he cannot in federal habeas corpus proceeding raise independent claims relating to deprivation of constitutional rights that antedated the plea, such as infirmities in grand jury selection process, but may only attack voluntary and intelligent character of the guilty plea by showing that counsel's advice was not within standards of *McMann* v. *Richardson,* 397 U. S. 759. Tollett v. Henderson, p. 258.

PROCEDURE—Continued.

4. *Habeas corpus—Release on recognizance—In custody.*—Restraints imposed on petitioner who was released on his own recognizance constitute "custody" within meaning of federal habeas corpus statute. Hensley v. Municipal Court, p. 345.

5. *Injunction by Federal District Court—Abstention—Action pending in state court.*—Though the District Court did not abuse its discretion in not abstaining until the *Lee Optical* decision was rendered by the Alabama Supreme Court, the principles of equity, comity, and federalism warrant reconsideration of this case in the light of that decision. Gibson v. Berryhill, p. 564.

6. *Judgments—Certainty of date—Timeliness of appeals.*—Provision in Fed. Rule Civ. Proc. 58 that "[e]very judgment" of a district court "shall be set forth on a separate document" which, *inter alia,* starts the time limit for appeals and post-trial motions running, is a mechanical provision that must be mechanically applied to render certain the date on which a judgment is entered. United States v. Indrelunas, p. 216.

7. *Reinstatement of appeal—Dismissal for failure to pay filing fee.*—Reinstatement, unopposed by Solicitor General, of *in forma pauperis* appeal that had been dismissed for failure to pay filing fee, directed in exercise of Court's supervisory powers. Gaca v. United States, p. 618.

8. *Revocation of probation—Hearings—Appointment of counsel.*—Body conducting revocation of probation hearings should decide in each individual case whether due process requires that an indigent probationer be represented by counsel. In every case where a request for counsel is refused, the grounds for refusal should be stated succinctly in the record. Gagnon v. Scarpelli, p. 778.

9. *State prisoners—Speedier release—Remedy.*—When state prisoner challenges the fact or duration of his physical imprisonment and by way of relief seeks a determination that he is entitled to immediate release or speedier release, his sole remedy is a writ of habeas corpus. Preiser v. Rodriguez, p. 475.

10. *Waivers—Composition of grand jury—Untimely claim.*—Waiver standard in Fed. Rule Crim. Proc. 12 (b)(2) governs untimely claim of grand jury discrimination, not only during the criminal proceeding but also later on collateral review. Davis v. United States, p. 233.

PROFESSIONAL ASSOCIATIONS. See **Abstention; Civil Rights Act of 1871,** 2; **Injunctions; Optometry; Procedure,** 5.

PROFITS. See **Securities Exchange Act of 1934.**

PROOF. See **Civil Rights Act of 1964,** 1–3.

PROPERTY TAXES. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

PROTESTING EMPLOYMENT CONDITIONS. See **Civil Rights Act of 1964,** 1–3.

PUBLIC INTEREST. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

PUBLIC OFFERING PRICES. See **Taxes,** 2.

PUBLIC SCHOOLS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

PURCHASE OF MAGAZINE SUBSCRIPTIONS. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

QUARTERS ALLOWANCES. See **Armed Forces; Constitutional Law,** I, 1.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964,** 1–3; **Procedure,** 3, 10; **Voting Rights Act,** 1–4.

RATEMAKING. See **Administrative Procedure,** 4; **Taxes,** 4.

RATIONAL BASIS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

REAPPORTIONMENT. See **Voting Rights Act,** 1–4.

REASONABLE-CAUSE FINDING. See **Civil Rights Act of 1964,** 1–3.

REBUTTAL. See **Civil Rights Act of 1964,** 2–3.

RECOGNIZANCE. See **Habeas Corpus,** 1; **Procedure,** 4.

RECORDS OF THE CASE. See **Pleas,** 1; **Procedure,** 2.

RECOVERY OF PROFITS. See **Securities Exchange Act of 1934.**

REDEMPTION PRICES. See **Taxes,** 2.

REDISTRICTING. See **Voting Rights Act,** 1–4.

REGULATION OF AIRCRAFT NOISE. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

REGULATIONS. See **Rivers and Harbors Act of 1899,** 1–2; **Voting Rights Act,** 1–4.

"REGULATION Z." See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

REIMBURSEMENT FOR EDUCATIONAL SERVICES. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

REINSTATEMENT OF APPEALS. See **Appeals,** 1; **Procedure,** 7.

RELEASE FROM PRISON. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

RELEASE ON RECOGNIZANCE. See **Habeas Corpus,** 1; **Procedure,** 4.

RELIANCE ON REGULATIONS. See **Rivers and Harbors Act of 1899,** 1–2.

RELIANCE ON STATUTORY SCHEME. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

RELIEF. See **Constitutional Law,** II, 2; **Civil Rights Act of 1871,** 3; **Elections; Habeas Corpus,** 2; **Pleas,** 1; **Procedure,** 3, 9–10; **Waivers.**

RELIGION CLAUSES. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

REMEDIES. See **Administrative Procedure,** 6; **Civil Rights Act of 1871,** 3; **Fair Labor Standards Act; Habeas Corpus,** 2; **Judicial Review,** 4; **Procedure,** 9.

REPLACEMENT PROPERTY. See **Administrative Procedure,** 4; **Taxes,** 4.

REQUEST FOR COUNSEL. See **Constitutional Law,** I, 2; **Probation; Procedure,** 8.

RESERVATION INCOME. See **Indians,** 1; **Taxes,** 1.

RESERVATION LANDS. See **Indians,** 1; **Taxes,** 1.

RESTRAINTS. See **Habeas Corpus,** 1; **Procedure,** 4.

RETAIL STORES. See **Constitutional Law,** V; **Evidence; Standing.**

RETROACTIVITY. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

REVOCATION OF PROBATION. See **Constitutional Law,** I, 2; **Probation; Procedure,** 8.

RIGHT TO COUNSEL. See **Constitutional Law,** I, 2; **Probation; Procedure,** 8.

RIGHT TO VOTE. See **Voting Rights Act,** 1–4.

RIVERS AND HARBORS ACT OF 1899.

1. *Discharge of industrial pollutants—Administrative construction—Permit procedures.*—The prohibitions of § 13 of the Act apply without regard to formalized permit procedures that it authorizes but does not mandate, and Congress did not intend to permit discharges specifically prohibited by § 13 when it enacted the 1965 and 1970 Water Quality Acts directing States to create pollution prevention and abatement programs. United States v. Pennsylvania Chem. Corp., p. 655.

2. *Pollutants—Corps of Engineers—Obstructions to navigation.*—Although § 13 of the Act bars all discharges of pollutants and not only those that constitute obstructions to navigation, the Corps of Engineers consistently limited its regulations to such obstructions and thus may have deprived respondent of fair warning as to what conduct the Government intended to make criminal. United States v. Pennsylvania Chem. Corp., p. 655.

ROBBERY. See **Pleas,** 1; **Procedure,** 2.

ROMAN CATHOLIC SCHOOLS. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

RULEMAKING. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

RULES OF APPELLATE PROCEDURE. See **Appeals,** 2; **Judgments; Procedure,** 6.

RULES OF CIVIL PROCEDURE. See **Appeals,** 2; **Judgments; Procedure,** 6.

RULES OF CRIMINAL PROCEDURE. See **Pleas,** 1; **Procedure,** 2, 10; **Waivers.**

SALES CHARGES. See **Taxes,** 2.

SALES OF STOCK. See **Securities Exchange Act of 1934.**

SAN ANTONIO. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

SANCTIONS. See **Administrative Procedure,** 5–6; **Constitutional Law,** III; **Judicial Review,** 4; **Penalties.**

SCHOOL-FINANCING SYSTEM. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

SCHOOLS. See also **Aid to Education; Constitutional Law,** II, 3; IV; **Judicial Review,** 2.

1. *Religion Clauses—Aid to nonpublic sectarian schools—Payments after invalidation of program.*—District Court's decree on remand

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following this Court's invalidation in *Lemon* v. *Kurtzman,* 403 U. S. 602, of Pennsylvania's statutory program to reimburse nonpublic sectarian schools for secular educational services, enjoining any payments for services rendered after that opinion but permitting Pennsylvania to reimburse the schools for services prior thereto, is affirmed. Lemon v. Kurtzman, p. 192.

2. *Texas school-financing system—Equal protection of the laws.*—The Texas school-financing system does not violate the Equal Protection Clause of the Fourteenth Amendment. Though concededly imperfect, the system bears a rational relationship to a legitimate state purpose. While assuring basic education for every child in the State, it permits and encourages participation in and significant control of each district's schools at the local level. San Antonio School District v. Rodriguez, p. 1.

SEARCH WARRANTS. See **Constitutional Law,** V; **Evidence; Standing.**

SEA-TO-SHORE POLLUTION. See **Federal-State Relations,** 1; **Pollution.**

SECONDARY SCHOOLS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

SECRETARY OF AGRICULTURE. See **Administrative Procedure,** 6; **Judicial Review,** 4.

SECRETARY OF LABOR. See **Fair Labor Standards Act.**

SECTARIAN SCHOOLS. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

SECULAR EDUCATIONAL SERVICES. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

SECURITIES. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3; **Securities Exchange Act of 1934; Taxes,** 2.

SECURITIES EXCHANGE ACT OF 1934.

Tender offer for shares of stock—Defensive merger—Option to surviving company to purchase exchanged shares.—Where the target of a tender offer defends itself by merging into a third company and the tender offeror then exchanges its stock for that of the surviving company and grants an option to the latter to purchase the exchanged stock that is not exercisable within the statutory six months' period, the transactions, which were not based on a statutory in-

SECURITIES EXCHANGE ACT OF 1934—Continued.

sider's information and were not susceptible of the speculative abuse that § 16 (b) of the Act was designed to prevent, did not constitute "sales" within the meaning of that provision. Kern County Land Co. v. Occidental Petroleum, p. 582.

SELECTION OF JURIES. See **Pleas,** 2; **Procedure,** 3, 10; **Waivers.**

SENTENCES. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 1–2; **Procedure,** 4, 9.

SEPARATE DOCUMENTS. See **Appeals,** 2; **Judgments; Procedure,** 6.

SEX DISCRIMINATION. See **Armed Forces; Constitutional Law,** I, 1.

SHARES IN MUTUAL FUNDS. See **Taxes,** 2.

SHARES OF STOCK. See **Securities Exchange Act of 1934.**

SHERIFF'S DEPUTIES. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

SHIPPING ACT, 1916. See **Antitrust Acts; Federal Maritime Commission.**

SHIPPING LINES. See **Antitrust Acts; Federal Maritime Commission.**

SHIPS. See **Federal-State Relations,** 1; **Pollution.**

SHORT-SWING SPECULATIONS. See **Securities Exchange Act of 1934.**

SHORT-WEIGHTING. See **Administrative Procedure,** 6; **Judicial Review,** 4.

SKI RESORTS. See **Indians,** 2; **Taxes,** 3.

SOVEREIGNTY. See **Indians,** 1; **Taxes,** 1.

SPECULATIVE ABUSE. See **Securities Exchange Act of 1934.**

SPEEDIER RELEASE FROM PRISON. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Procedure,** 9.

SPOUSES OF MILITARY PERSONNEL. See **Armed Forces; Constitutional, Law,** I, 1.

"STALL-IN" DEMONSTRATIONS. See **Civil Rights Act of 1964,** 1–3.

STANDARDS. See **Administrative Procedure,** 1; **Constitutional Law,** II, 3; **Judicial Review,** 1; **Schools,** 2.

STANDARDS, PRACTICES, OR PROCEDURES. See **Voting Rights Act,** 1–4.

STANDING. See also **Constitutional Law,** V; **Evidence.**

Admission of evidence—Defective warrants—No interest in premises searched or goods seized.—Petitioners had no standing to contest admission of evidence seized under defective warrant since they alleged no legitimate expectation of privacy or interest of any kind in the premises searched or the goods seized; and they could not vicariously assert the personal Fourth Amendment right of the store owner in contesting admission of the seized goods. Brown v. United States, p. 223.

STATE AID TO EDUCATION. See **Aid to Education; Constitutional Law,** II, 3; IV; **Judicial Review,** 2; **Schools,** 1–2.

STATE EMPLOYEES. See **Fair Labor Standards Act.**

STATE LAW CLAIMS. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

STATE LEGISLATURES. See **Voting Rights Act,** 1–4.

STATE POLICE POWER. See **Federal-State Relations,** 1; **Pollution.**

STATE PRISONERS. See **Civil Rights Act of 1871,** 3; **Habeas Corpus,** 2; **Pleas,** 2; **Procedure,** 3, 9.

STATE PURPOSES. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

STATE STATUTES. See **Courts; District of Columbia Code; Procedure,** 1.

STATE TAXES. See **Indians,** 1–2; **Taxes,** 1, 3.

STATE TORT CLAIMS STATUTE. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

STATUTORY EXEMPTIONS FROM STATE TAXES. See **Indians,** 2; **Taxes,** 3.

STATUTORY INSIDERS. See **Securities Exchange Act of 1934.**

STATUTORY VIOLATIONS. See **Administrative Procedure,** 6; **Judicial Review,** 4.

STAY OF EXECUTION OF SENTENCE. See **Habeas Corpus,** 1; **Procedure,** 4.

STAY ORDERS. See **Voting Rights Act,** 1–4.

STOCK PURCHASES. See **Securities Exchange Act of 1934.**

STOCKYARD OPERATORS. See **Administrative Procedure,** 6; **Judicial Review,** 4.

STOLEN GOODS. See **Constitutional Law,** V; **Evidence; Standing.**

STRAIGHT-LINE DEPRECIATION. See **Administrative Procedure,** 4; **Taxes,** 4.

STRICT JUDICIAL SCRUTINY. See **Administrative Procedure,** 2–3; **Constitutional Law,** II, 3; **Federal Power Commission; Judicial Review,** 2–3; **Schools,** 2.

SUABLE "PERSONS." See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

SUBSTANTIAL-EVIDENCE TEST. See **Administrative Procedure,** 1; **Judicial Review,** 1.

SUITS AGAINST STATES. See **Fair Labor Standards Act.**

SUMMARY DISPOSITION. See **Administrative Procedure,** 2–3; **Federal Power Commission; Judicial Review,** 3.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. See **Courts; District of Columbia Code; Procedure,** 1.

SUPERVISION OF AGREEMENTS. See **Antitrust Acts; Federal Maritime Commission.**

SUPERVISORY POWERS. See **Appeals,** 1; **Procedure,** 7.

SUPPRESSION OF EVIDENCE. See **Constitutional Law,** V; **Evidence; Standing.**

SUPREMACY CLAUSE. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

SUPREME COURT. See also **Appeals,** 1; **Courts; District of Columbia Code; Procedure,** 1, 7.

1. Tribute to MR. JUSTICE DOUGLAS, p. v.
2. Bankruptcy Rules and Official Bankruptcy Forms, p. 989.

SUSPECT CLASSIFICATIONS. See **Armed Forces; Constitutional Law,** I, 1.

SUSPENSIONS. See **Administrative Procedure,** 6; **Judicial Review,** 4.

TAKEOVER OF CORPORATION. See **Securities Exchange Act of 1934.**

TAXES. See also **Administrative Procedure,** 4; **Constitutional Law,** II, 3; **Indians,** 1–2; **Judicial Review,** 2; **Schools,** 2.

1. *Arizona income taxes—Navajo Indians—Income from reservation sources.*—Arizona has no jurisdiction to impose tax on income of Navajo Indians residing on the Navajo Reservation and whose income is wholly derived from reservation sources, as is clear from the relevant treaty with the Navajos and federal statutes. McClanahan v. Arizona State Tax Comm'n, p. 164.

2. *Estate taxes—Valuation of mutual fund shares—Treasury Regulations.*—Shares in mutual funds can be "sold" by the shareholder only back to the fund and only at a set redemption price. Treas. Reg. § 20.2031–8 (b), requiring that such shares be valued for federal estate tax purposes at the current public offering ("asked") price, which is determined by adding a load or sales charge to the net asset value, is clearly inconsistent with the Investment Company Act of 1940, and is therefore invalid. United States v. Cartwright, p. 546.

3. *Ski resort operated by Indians—Off-reservation land—Permanent improvements.*—New Mexico may impose gross receipts tax on ski resort operated by petitioner Tribe on off-reservation land leased from Federal Government under § 5 of the Indian Reorganization Act, 25 U. S. C. § 465. Though § 465 exempts the land from state and local taxation, neither it nor the federal-instrumentality doctrine bars taxing income from the land. But § 465 bars use tax that State seeks to impose on personalty bought by Tribe out of State and which, having been installed as a permanent improvement at the resort, became so intimately connected with the land as to be covered by the statutory exemption. Mescalero Apache Tribe v. Jones, p. 145.

4. *Tax Reform Act of 1969—Federal Power Commission—Change in depreciation for utility companies.*—Section 441 of the Act does not deprive the FPC of the authority to permit a utility subject to its Natural Gas Act jurisdiction to change depreciation method that it uses for ratemaking from accelerated depreciation with "flow through" of the utility's tax savings to customers to accelerated depreciation with normalization, with respect to pre-1970 property as well as replacement property. FPC v. Memphis Light, Gas & Water Div., p. 458.

TAX IMMUNITY. See **Indians,** 1; **Taxes,** 1.

TAX REFORM ACT OF 1969. See **Administrative Procedure,** 4; **Taxes,** 4.

TENDER OFFERS. See **Securities Exchange Act of 1934.**

TENNESSEE. See **Pleas,** 2; **Procedure,** 3.

TESTIMONY. See **Constitutional Law,** V; **Evidence; Standing.**

TEXAS. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

TIMELINESS OF APPEALS. See **Appeals,** 2; **Judgments; Procedure,** 6.

TORT CLAIMS. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

TRANSFER OF ASSETS. See **Antitrust Acts; Federal Maritime Commission.**

TRANSPORTING STOLEN GOODS. See **Constitutional Law,** V; **Evidence; Standing.**

TREASURY REGULATIONS. See **Taxes,** 2.

TREATIES. See **Indians,** 1; **Taxes,** 1.

TRIBAL SELF-GOVERNMENT. See **Indians,** 1; **Taxes,** 1.

TRUTH IN LENDING ACT. See **Administrative Procedure,** 5; **Constitutional Law,** III; **Penalties.**

UNCONSTITUTIONALITY OF STATUTE. See **Aid to Education; Constitutional Law,** IV; **Schools,** 1.

UNCOUNSELED GUILTY PLEAS. See **Pleas,** 1; **Procedure,** 2.

UNDERCOVER AGENTS. See **Entrapment.**

UNPROFESSIONAL CONDUCT. See **Abstention; Civil Rights Act,** 3; **Injunctions; Optometry; Procedure,** 5.

UNTIMELINESS OF APPEALS. See **Appeals,** 2; **Judgments; Procedure,** 6.

UNTIMELY CLAIMS. See **Procedure,** 10; **Waivers.**

USE TAXES. See **Indians,** 2; **Taxes,** 3.

UTILITY COMPANIES. See **Administrative Procedure,** 2–4; **Federal Power Commission; Judicial Review,** 3; **Taxes,** 4.

VALUATION OF MUTUAL FUND SHARES. See **Taxes,** 2.

VICARIOUS LIABILITY. See **Civil Rights Act of 1871,** 1; **Jurisdiction,** 1–2.

VIOLATIONS OF STATUTE. See **Administrative Procedure,** 6; **Judicial Review,** 4.

VOLUNTARINESS. See **Pleas,** 1; **Procedure,** 2.

VOTING RIGHTS ACT.

1. *Georgia Legislature reapportionment—Diluting Negro voting power—Standards, practices, or procedures.*—Georgia's 1972 reapportionment changes, which have the potential for diluting Negro voting power, are "standards, practices, or procedures with respect to voting" within the meaning of § 5 of the Act. Georgia v. United States, p. 526.

2. *Georgia reapportionment—Objections by Attorney General—Mootness.*—Georgia's claim that the Attorney General did not seasonably object to the 1971 apportionment plan may well be moot in view of his timely objection to the superseding 1972 plan, but in any event that claim lacks merit as the Attorney General's regulation that the statutory 60-day period begins to run from the time that necessary information is furnished is reasonable and conforms with the Act. Georgia v. United States, p. 526.

3. *Georgia reapportionment—Racially discriminatory purpose—Burden of proof.*—The Attorney General, applying a permissible regulation, placed the burden of proof on Georgia as the submitting party to establish that its 1972 reapportionment plan did not have a racially discriminatory purpose or effect on voting, and the State failed to meet that burden. Georgia v. United States, p. 526.

4. *Georgia reapportionment plan—Elections—Injunctions.*—Elections having been conducted under the 1972 legislative reapportionment plan under this Court's stay order, new elections are not required, but future elections under that plan will be enjoined until a plan withstanding § 5 clearance procedures is submitted. Georgia v. United States, p. 526.

WAIVER OF COUNSEL. See **Pleas,** 1; **Procedure,** 2.

WAIVERS. See also **Procedure,** 10.

Composition of grand jury—Untimely claim—Fed. Rule Crim. Proc. 12 (b)(2).—Waiver standard in Fed. Rule Crim. Proc. 12 (b)(2) governs untimely claim of grand jury discrimination, not only during the criminal proceeding but also later on collateral review. The District Court, in light of record of this case, did not abuse its discretion in denying petitioner relief from the application of the waiver provision. Davis v. United States, p. 233.

WARRANTS. See **Constitutional Law,** V; **Evidence; Standing.**

WATER POLLUTION. See **Federal-State Relations,** 1; **Pollution; Rivers and Harbors Act of 1899,** 1–2.

WATER POLLUTION PREVENTION AND CONTROL ACT AMENDMENTS OF 1972. See **Federal-State Relations,** 1; **Pollution.**

WATER QUALITY IMPROVEMENT ACT. See **Federal-State Relations,** 1; **Pollution.**

WEALTH. See **Constitutional Law,** II, 3; **Judicial Review,** 2; **Schools,** 2.

WELFARE PROGRAMS. See **Constitutional Law,** II, 1.

WIRETAPPING. See **Appeals,** 1; **Procedure,** 7.

WORDS.

1. *"In custody."* 28 U. S. C. §§ 2241 (c) (3), 2254 (a). Hensley v. Municipal Court, p. 345.

2. *"Sale."* § 16 (b), Securities Exchange Act of 1934, 15 U. S. C. § 78p (b). Kern County Land Co. v. Occidental Petroleum, p. 582.

3. *"Standards, practices, or procedures with respect to voting."* § 5, Voting Rights Act, 42 U. S. C. § 1973c. Georgia v. United States, p. 526.

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